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In The

Supreme Court of the United States

October Term, 1982

VERDIA JONES,

Petitioner,

—v.—

~~CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT~~, ROBERT BIRDSONG, ~~LEON PORTER, GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., ROBERT ELLARD, TERRY MOOD,~~ et al., *Respondents.*

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI

CHARLES VICTOR MCTEER
WILLIE L. BAILEY
MCTEER & BAILEY, P.A.
P.O. Box 1835
218 S. Theobald Street
Greenville, MS 38701
(601) 335-2100
Attorneys for Petitioner
Verdia Jones

Questions Presented for Review

1. Whether Rule 38, Federal Rules of Civil Procedure requires a party to submit a demand for jury trial following the filing of such a demand by another party.

2. Whether a party waives the right to trial by jury when he relies upon another party's previously submitted demand for jury trial.

3. Whether parties to a suit seeking equitable relief and legal damages for humiliation, embarassment, mental pain and suffering in an employment discrimination action based upon race under 42 U.S.C. § 1981 and 1983 are entitled to trial by jury on the legal claims.

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5 J. Moore and J. Lucas, Federal Practice, § 38.39[1] and § 38.45 (2nd Ed. 1981) 16

9 Wright and Miller, Federal Practice and Procedure Civil: § 2318 at 85 15

Opinions and Orders Below

The opinion of the District Court for the Northern District of Mississippi is reported at 530 F. Supp. 221 (N.D. Miss. 1980). The opinion of the Court of Appeals for the Fifth Circuit is reported at 679 F.2d 24 (5th Cir. 1982).

The orders of the United States District Judge denying the parties trial by jury were made and entered on 3 January 1978, 12 July 1978. Copies thereof are appended to this petition in the Appendix.

The order of the United States Magistrate denying the parties trial by jury were made and entered on 21 March 1979. A copy is appended to this petition in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was made and entered on 24 May 1982 and copies thereof are appended to the petition in the Appendix. On 19 July 1982 the Fifth Circuit Court of Appeals denied Mrs. Jones' Petition for Rehearing and Suggestion for Rehearing *en banc*. On 7 October 1982, Mr. Justice Byron White signed an order extending the time for filing this petition until 6 November 1982. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

Constitutional Provisions, Treatise, Statutes Ordinances and Regulations Involved

42 U.S.C. §1981

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefits of all laws and proceedings for the security

of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

Seventh Amendment to the United States Constitution

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, then according to the rules of the common law.

Fourteenth Amendment to the United States Constitution

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any persons within its jurisdiction the equal protection of the laws.

Section 5

The congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Rule 38 of the Federal Rules of Civil Procedure

(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(c) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(e) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 39(a), Federal Rules of Civil Procedure

(a) By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (a) the parties of their attorneys of record, by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (2) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the United States.

Statement of the Case

A. Nature of the Case

Petitioner Verdia Jones presents this Petition seeking review of a decision denying the parties trial by jury of certain damage claims presented in her employment discrimination action. On 23 September 1977 Mrs. Jones, a former black guidance counselor at Clarksdale High School, and the only black or female person to have held that position, filed her complaint in the United States District Court for the Northern District of Mississippi pursuant to 42 U.S.C. § 1981, 1983 and the equal protection clause of the Fourteenth Amendment to the United States Constitution. The District Court's jurisdiction was invoked pursuant to 28 U.S.C. § 1331 and 1343. Additionally, Mrs. Jones sought application of the court's pendent jurisdiction to adjudicate her state contract

claims. She alleged that the respondent school district discriminated against her on the basis of race.

The suit included six basic claims. First, she contended that she was segregated from all white guidance personnel and secretarial staff and did not have the same access to student records and clerical assistance as white counselors. Second, she did not have the same professional rights, privileges and benefits of employment as white counselors. Third, she was assigned subordinate and inferior job tasks when compared to white counselors. Fourth, her employment was conditioned upon the availability of federal funds whereas white counselors were unconditionally paid from School District funds. Fifth, she was required to perform job duties outside of her area of substantial experience whereas white counselors were assigned to tasks belying their training and experience. Finally, Mrs. Jones claimed that the defendants had breached her contract of employment under state law by paying her less salary than agreed. In addition to equitable relief, Mrs. Jones demanded $30,000.00 compensatory damages for the embarrassment, humiliation, mental pain and anguish caused by defendants' actions and punitive damages in the same amount.[1]

On 17 November 1977 Respondents filed their answer. Thereafter, on 22 November 1977 the Respondents made a timely demand for jury trial on Mrs. Jones' claims for backpay, compensatory and punitive damages. (See Appendix at 55a, *Infra.*) On 1 December 1977 the petitioner filed a motion to strike the School District's demand for a jury trial on the backpay issue. (*Id.* at 56a, *Infra.*) Plaintiff made no objection to Respondent's request for jury trial regarding compensatory or punitive damages.

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[1] The complaint originally requested $10,000.00 compensatory damages and $1,000.00 punitive award. At trial, however, the Court allowed these amounts to be increased as set forth above.

On 3 January 1978 the District Judge entered its order striking all jury trial demands including the request for compensatory and punitive damage claims. (*Id.* at 49a, *Infra.*) The District Judge determined neither party to this action had any right to trial by jury on any legal or equitable action raised in the case.

> It is well settled that there is no right to jury trial in an employment discrimination suit under § 1981 or § 1983 even though claims for compensatory or punitive damages are made. *Jones* v. *Birdsong*, Civil Action No. DC 77-94-WK-0 (Order of January 3, 1978, ND Miss) (*Id.* at 49a, *infra.*)

On 16 June 1978 the defendants filed a motion for reconsideration of the order entered 3 January 1978. Mrs. Jones filed no objection to this request. Nonetheless, the trial court denied the request on 12 July 1978. On 3 August 1978 Mrs. Jones filed an amended complaint adding a claim under Title VII, 42 U.S.C. § 2000e to her claims under 42 U.S.C. §§ 1981, 1983, the equal protection clause of the 14th Amendment and state contract law.

At a pre-trial conference before a Magistrate on 3 March 1979, Mrs. Jones moved for trial by jury on the legal issues and a simultaneous non-jury trial on all equitable claims. Said request was denied by the magistrate. Neither party made any additional demands for jury trial. Mrs. Jones did not consent to any withdrawal of the defense demand for trial by jury.

Following a four-day jury trial the District Judge issued an opinion dismissing the complaint with prejudice as to all Mrs. Jones' claims. *Jones* v. *Birdsong*, 530 F. Supp. 221 (ND Miss. 1980). Thereafter, Petitioner prosecuted an appeal to the United States Court of Appeals for the Fifth Circuit.

B. Decision of the Court of Appeals

The Court of Appeals panel (Brown, Coleman and Rubin, Circuit Judges) affirmed the trial court noting that the findings were not "clearly erroneous" as defined by Rule 52(a) Federal Rules of Civil Procedure. The judges disagreed, however, regarding Mrs. Jones' contention that the District Judge denied the parties a jury trial on her legal claims. The panel majority found that Mrs. Jones failed to object to the District Judge's denials of the respondents' demands for jury trial. The majority also found that Mrs. Jones failed to appeal the magistrate's decision denying a right to jury trial at the pretrial conference to the District Judge. In pertinent part, the court noted a "special duty" of the Petitioner herein to demand trial by jury:

> Under the circumstances, *the Plaintiff was under a special duty to speak out about any desire for a jury.* Her counsel knew, or was certainly charged with the knowledge, that in the case of *Lynch* v. *Pan American World Airways, Inc.*, 475 F. 2d 764 (5th Cir., 1973), in a racial discrimination case which sought reinstatement with back pay, compensatory damages, and punitive damages, the Fifth Circuit held that the trial court *properly struck* the plaintiff's motion for a jury trial because the action was equitable in nature. Unless the point were raised and unless there was convincing argument to the contrary, Mrs. Jones should have expected that the District Judge would consider himself bound by the ruling in *Lynch.* In conclusion, we cannot countenance an effort to reverse the District Court from ambush. *Jones* v. *Birdsong*, 679 F.2d at 25.

Additionally, the majority noted:

> What it all comes down to is that plaintiff had repeated opportunities to file a Rule 38(b) motion

> for a jury trial and she chose not to do it. When Judge Keady denied the defendants' motion for a jury trial *the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself* but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury. 679 F.2d at 26.

The majority expressly refused to determine or find that Mrs. Jones was entitled to a jury trial on her legal damage claims. Therefore, the District Judge's refusal to grant a jury trial was never addressed by the appellate court.

> We need not decide, and we offer no intimation, as to whether if she had properly asserted it Mrs. Jones would have been entitled to a jury trial as now claimed. 679 F.2d at 24.

> Leaving aside the issue of whether she would have been entitled to a jury if she had properly sought such a trial, we firmly decline the suggestion that the District Court should be cast in error. 679 F.2d at 26.

Hon. Alvin B. Rubin, Circuit Judge, dissented finding that the District Court was incorrect in determining upon its own initiative that compensatory and punitive damages could not be tried by a jury in an employment discrimination case.

Backpay is an integral part of the equitable remedy of reinstatement. *Harkless* v. *Swenny Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, 91 S. Ct. 451, 27 LEd 2d 439 (1971). Therefore, the district court was correct in denying the demand for a jury trial on the backpay issue. Compensatory and punitive damages present legal issues and are proper issues for jury determination. *Whiting* v. *Jackson State University*, 616 F.2d 116, 122 (5th Cir. 1980). This circuit, however, "has not yet decided whether actual or punitive damages are recoverable under the Title VII." *Id.* at 122 n.4. *See Claiborne* v. *Illinois Central Railroad*, 583 F.2d 143, 154 (5th Cir. 1978) ("Pretermitting the issue whether an award of punitive damages under Title VII alone would be proper, we are persuaded that such an award under section 1981 is permissible, even when the section 1981 claim is joined with the Title VII claims."), *cert. denied*, 442 U.S. 934, 99 S. Ct. 2869, 6a L. Ed. 2d 303 (1979).

The majority states that *Lynch* v. *Pan American World Airways, Inc.*, 475 F.2d 764 (5th Cir. 1973) (per curiam), held that "the trial court properly struck the plaintiff's motion for a jury trial because the action was equitable in nature." Page 25, 679 F.2d, *supra*. This statement, I respectfully submit, misconstrues the holding of *Lynch*. The court in *Lynch* stated that reinstatement with backpay was an equitable claim, not to be determined by a jury. The court also stated that the plaintiff may not "by making unsupported allegations for compensatory and punitive damages —unilaterally alter the genre of the proceeding." *Id.* at 756. *Lynch* does not suggest that a jury should be denied if there is a good faith demand for compensatory damages with some evidentiary

> support. There is no indication in the instant case that Mrs. Jones' claims for compensatory and punitive damages are either unsupported or designed unilaterally to alter the mode of trial. 679 F.2d at 27 n.4 (dissenting opinion).

Judge Rubin reasoned that Mrs. Jones was properly entitled to rely upon the School District's timely trial demand.

> The defendants requested a jury trial and Mrs. Jones is entitled to rely on that request. The district judge, as well as the magistrate, denied a jury trial on all issues. *While the district judge was never presented with an appeal of the magistrate's ruling, he was not ambushed by Mrs. Jones. He knew that a jury trial was desired and he denied that right because he thought that the litigants were not entitled to a jury trial, rather than because of any procedural failing.* Mrs. Jones did not wait until the trial was over to make her position known. She was not denied a jury trial for failure to present a demand in writing or for the insufficiency of the defendants' demand. *Id.* at 29.

Judge Rubin found that the plaintiff's silence following the court's orders denying repeated jury requests was not waiver but professional compliance with the finality of the District Judge's Ruling.

> There was thereafter no waiver of the right to jury trial, oral or written. Mrs. Jones simply complied with the court's order. Her counsel's explanation of his client's failure to expositulate further appears to me to be adequate to negate waiver. *Id.*

In footnote 8, Judge Rubin states:

> He [Mrs. Jones' counsel] states in his brief: 'After three attempts to have a jury trial it was

> adamantly [sic] clear to both parties that no jury trial would be had in this cause absent intervention by a higher court. . . . After three attempts to gain a jury trial there was no need to risk the Court's ire.' *Id.* at 29

Existence of Jurisdiction Below

The District Court for the Northern District of Mississippi had jurisdiction over Mrs. Jones' claims under 28 U.S.C. § 1331 and 1343. Mrs. Jones properly invoked the pendent jurisdiction of the court to hear her state law contract claims.

ARGUMENT

The Parties To This Action Were Denied Their Seventh Amendment Right To Trial By Jury Of Their Legal Claims.

Following the School District's jury demand, the District Judge ruled the parties were not entitled to jury trial in this employment discrimination action brought pursuant to 42 U.S.C. § 1981, 1983 and the equal protection clause of the Fourteenth Amendment. No procedural error or failure was made by any party under the Federal Rules of Civil Procedure which would cause waiver of the right to jury trial.

The Court of Appeals refused to determine that Mrs. Jones was entitled to a jury trial on her legal claims. The Court ruled that Mrs. Jones' failure to make an independent jury demand barred her from pursuing her Seventh Amendment right. The court ignored the established rule that a party may rely upon a timely jury demand made by another party and need not make an additional demand of his own. For the reasons setforth hereinafter, this court should review these decisions.

The Parties Were Entitled To Trial By Jury On The Legal Issues Raised In The Original Complaint.

> [T]he Seventh Amendment does apply to actions enforcing statutory rights and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. *Curtis* v. *Loether*, 415 U.S. 189, 194 (1974).

Likewise, juries may hear claims against state officials under the Fourteenth Amendment since federal courts may use legal as well as other remedies to make good the wrong done. *Bell* v. *Hood*, 327 U.S. 678 (1946); *Bivens* v. *Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 396 (1971). 42 U.S.C. § 1981 and 1983 are independent and statutory rules conferring substantive rights to those who seek their protection. *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Johnson* v. *Railway Express Agency*, 421 U.S. 454, 457-461 (1975); *Great American Savings and Loan Association* v. *Novotny*, 442 U.S. 366, 377 n.21 (1979). The equal protection clause of the Fourteenth Amendment similarly confers substantive rights to persons who are deprived privileges and immunities secured by the Constitution. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976).

Parties to actions brought pursuant to these independent constitutional and statutory causes are entitled to both legal and equitable remedies. The legal rights available include compensatory and, under certain circumstances, punitive damages. *Johnson* v. *Railway Express Agency*, *supra*. 421 U.S. at 460; *Carey* v. *Piphus* 435 U.S. 247, 256-257 n.11 (1978).

Litigants in employment discrimination actions raising legal claims under 42 U.S.C. § 1981 and 1983 and constitutional amendments are entitled to jury trial, upon proper demand. *Whiting* v. *Jackson State University*, 616 F.2d 116 (5th Cir. 1980); *Busche* v. *Burkee*, 649 F.2d

509 (7th Cir. 1981); *Donovan* v. *Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Amburgey* v. *Cassady*, 507 F.2d 728 (6th Cir. 1974); *Claiborne* v. *Illinois Central Railroad*, 583 F.2d 143 (5th Cir. 1978); *Johnson* v. *Ryder Truck Lines Inc.*, 575 F.2d 471 (5th Cir. 1978), *cert. denied*, 440 U.S. 979 (1979); *Garner* v. *Giarrusso*, 571 F.2d 1330 (5th Cir. 1978); *Allen* v. *Amalgamated Transit Union Local 788*, 544 F.2d 876 (8th Cir. 1977), *cert. denied*, 434 U.S. 891; *Sethy* v. *Alameda County Water District*, 545 F.2d 1157 (9th Cir. 1976); *Faraca* v. *Clements*, 506 F.2d 956 (5th Cir. 1976), *cert. denied*, 422 U.S. 1006. The nature of the cause *sub judice* entitled the parties to present their legal claim and defense before a jury while the District Judge adjudicated their equitable claims. This bifurcated trial procedure was approved by another panel of the Fifth Circuit in an employment discrimination case seeking damage and equitable relief under 41 U.S.C. § 1981, 1983 and the First Amendment. *Schneider* v. *City of Atlanta*, 678 F.2d 915 (5th Cir. 1980).

Judge Rubin correctly noted that the right to trial by jury is a constitutional privilege which should not be lightly inferred.

> The right to jury trial is not merely a creature of the rules of civil procedure, but is safeguarded by a jury of the suitor's peers is a favored right, and its waiver is not to be lightly inferred. *Aetna Insurance Company* v. *Kennedy*, 301 U.S. 389, 393, 57 S. Ct. 809, 812, 81 LEd 1177, 1180 (1937) ("courts indulge every reasonable presumption against waiver"). A federal district judge should not, therefore, be grudging in granting a jury demand. Even when the jury trial demand is not made within the ten days fixed by rule 38, the court in its discretion may order a jury trial. See Fed. R. Civ. P. 39(b). We have said that, when such a rule 39(b) motion is filed, "a court should grant a jury trial in the absence of strong and

compelling reasons to the contrary. 679 F.2d at 26 (dissenting opinion).

All Procedural Requirements Mandated Under Rule 38 of the Federal Rules of Civil Procedure Were Met by the Parties

Mrs. Jones complaint averred the alleged violation of her constitutional and statutory rights caused her embarrassment, humiliation, mental anguish and other compensable injury. *Carey* v. *Piphus*, *supra*. 435 U.S. at 255. Her demands included the equitable remedies of reinstatement and backpay as well as legal remedies of compensatory and punitive damages. In response to Mrs. Jones' legal and equitable claims, defendants filed a timely demand for jury trial pursuant to Rule 38(b), Federal Rules of Civil Procedure, demanding a jury trial on all issues. Mrs. Jones moved to strike the jury demand solely as to her equitable claims. *Lynch* v. *Pan American World Airways*, 475 F.2d 764, 765 (5th Cir. 1973); *Harkless* v. *Sweency Independent School District*, 427 F.2d 319, 324 (5th Cir. 1970).

On 3 January 1978 the District Judge citing *Lynch* v. *Pan American World Airways*, *supra.*, and *Harkless* v. *Sweeny Independent School District*, *supra.*, denied respondents' jury demand as to all claims, both legal and equitable. Thereafter, defendants filed a motion for reconsideration of the denial of a jury trial on legal issues. The defendants' second demand was deenied on 7 July 1978. At a pretrial conference before a magistrate, the plaintiff requested *ore tenus* a jury trial on all legal issues and simultaneous non-jury trial on equitable issues. By order of 21 March 1979 the request was denied. A jury demand was made timely and promptly under the Federal Rules of Civil Procedure. It was denied due to the District Judge's misinterpretation of the law. There was no procedural failure on the part of any party which triggered the jury demand denial.

The District Judge mistakenly interpreted the cited Fifth Circuit precedents in the *Lynch* and *Harkless* cases to deny the parties trial by jury of the legal claims. The Fifth Circuit majority gave credence by implication to that ruling by refusing to rule that litigants in employment discrimination cases had a right to trial by jury on legal claims. The District Judge's denial of the right to jury trial in this clearly conflicts with accepted prior rulings of Supreme Court and the various Courts of Appeals including other panels of the Fifth Circuit. This legal error was further compounded by the Fifth Circuit majority's refusal to allow Mrs. Jones to rely upon the respondents' jury demands.

Mrs. Jones Was Entitled To Rely Upon Another Party's Jury Demand

> If a timely an proper demand for a jury is made by one party, all of the parties to the action who are interested in the issues for which jury trial has been demanded may rely on that demand and need not make an additional demand of their own.
>
> 9 Wright and Miller, Federal Practice and Procedure Civil § 2318 at 85.

Numerous Courts of Appeals including the 5th Circuit have declared that a party may rely upon the timely jury demand of another party and need not make an additional demand. *Degiola* v. *United States Lines Co.*, 304 F.2d 421 (2nd Cir. 1962); *Collins* v. *Government of the Virgin Islands*, 366 F.2d 279, *cert. denied*, 386 U.S. 958 (1967); *Cram* v. *Insurance Office, Ltd.*, 375 F.2d 670, 675 (4th Cir. 1967); *Rachal* v. *Hill*, 435 F.2d 59, 63 n. 4 (5th Cir. 1970); *Calnetics Corp.* v. *Volkswagen of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940; *Southland Reship, Inc.* v. *Floyd*, 534 F.2d 639 (5th Cir. 1976); *Famiano* v. *Engcort*, 398 F.2d 661 (7th Cir. 1968); *Johnson* v. *Fidelity & Casualty Co. of New York*,

238 F.2d 322 (8th Cir. 1956); See also 5 J. Moore and J. Lucas, Federal Practice § 38.39[1] and § 38.45 (2nd Edition—1981).

Timely jury demand was made by the respondents. We find no case wherein a party was denied the right to rely upon the jury demand of his opponent. *Clearly, had the trial court hereien found for Mrs. Jones and awarded her damages, the School District could claim a denial of their Seventh Amendment rights.* Why then is Mrs. Jones denied the right to rely upon the District's jury demand?

The Court of Appeals placed the burden upon the petitioner to support another party's jury demand. "Under the circumstances, the plaintiff was under a special duty to speak out about any desire for a jury." 679 F.2d at 25. Yet, no such special duty is mentioned in the Federal Rules of Civil Proce[illegible] or court decisions interpreting these rules. No other Court of Appeals or District Court has setforth such a special duty.

The trial court was not ambushed by this appeal as suggested by the majority panel. It had full knowledge of the jury demand. *The fact that either or both parties supported the demand is irrelevant. If one party made the demand, all others had the right to rely therein.* The District Court did not deny the demand because of written or oral waiver, failure to comply with Rule 38 procedures or the conduct of any party. The trial court incorrectly denied the requested jury trial because it believed the parties were not entitled to exercise the right in the first instance.

No court has required a litigant to file an independent jury demand following a demand of another party. Under Rules 38(d) and 39(a)(1), Federal Rules of Civil Procedure, a party may not withdraw a demand absent adversarial consent of the other parties to the action. No such consent or waiver was given by Mrs. Jones on

the legal issues presented. Therefore, the majority panel's opinion creates a new interpretation of Rule 38(b) requiring a party to object to a denial of a jury demand by his adversary. This ruling completely ignores the established doctrine of reliance. It also confuses the constitutional policy and statutory procedures favoring jury trial except upon known, intentional and express waiver. *Aetna Insurance Co.* v. *Kennedy*, 301 U.S. 389, 393 (1937).

Mrs. Jones Did Not Waiver Her Seventh Amendment Rights By Failing To Object To The District Judge's Denial Of Another Party's Jury Demand

It is agreed by the parties that on two occasions the trial court denied defendant's demand for a jury trial on the legal damages issue in the absence of an objection from plaintiff. On a third occasion plaintiff made such a request which was again rejected. It is undisputed that the District Judge ruled that parties in employment discrimination suits were not entitled to jury trials even where claims for legal damages under federal and state law were annexed to the equitable claim. In this cause, the parties were completely foreclosed from a jury trial as a consequence of the trial court's view of the law in such suits and not as a result of any waiver, action or conduct of either party.

After three attempts to have a jury trial it was apparent to both parties that no jury trial would be had in this cause absent intervention by a higher court. Indeed, in another case the same District Judge awarded a defendant considerable attorney fees against a plaintiff, finding that the plaintiff's repeated demands for reconsideration of procedural issues previously ruled upon by the Court were "improvident" and "contamacious of solemn judicial orders." *Flora* v. *Moore*, 461 F. Supp. 1104, 1121 (ND Miss. 1978). Such rulings have a "chilling effect" upon the repetitious presentation of motions

before the same court no matter how worthy. After three attempts to gain a jury trial there was no need to risk the Court's ire.

The parties in this case acted with reason in asking for a jury trial on those occasions. However, at some point the parties must adhere to the ruling of the Court no matter what they may feel concerning the correctness of a particular determination. This is particularly true where the District Judge subscribes to an arguably incorrect view of the law. While many attorneys would appreciate codification of the special duty to "speak out" described by the majority panel, such conduct before some District judges would be foolhardy and unprofessional.

The jury demand had been presented and rejected. The Court had ruled that no jury trial would be held in this case. The Federal Rules of Civil Procedure do not require an independant request for jury trial or further challenge of the court's decision. Under such circumstances, the right to reliance provides a welcome respite from the prospect of continued and/or unnecessary bickering with a United States District Judge.

The majority suggests that plaintiff could have presented her own jury demand following the court's ruling denying the defense demand. Yet, the plaintiff's motion to strike expressly requested denial of the jury trial solely on equitable issues. More importantly, accepted judicial procedure allowed Mrs. Jones the right to rely upon the defense demand. Unsurprisingly, the majority opinions fails to mention the reliance doctrine.

CONCLUSION

The decision of the Fifth Circuit Court of Appeals substantially conflicts with the decisions of this Court and all other circuits regarding the right of a party to rely upon the jury demand of another party. It further sanctions a Lower Court departure from accepted and usual judicial proceedings allowing a jury trial, upon timely demand, of legal claims in employment discrimination actions brought under 42 USC §§ 1981 and 1983 and the Equal Protection Clause of the Fourteenth Amendment. In the alternative the determination that the Seventh Amendment right to jury trial does no extend to parties regarding claims of compensatory and punitive damages for humiliation, embarrassment, mental pain and anguish in 1981 and 1983 and Title VII Employment Discrimination Actions Against State Officials raises an important question of federal law which should be settled by this court. Such Rulings call for this Court's supervision and review upon *writ of certiorari.*

Respectfully submitted,

This the 1st day of November, 1982.

CHARLES VICTOR MCTEER
WILLIE L. BAILEY
MCTEER & BAILEY, P.A.
P.O. Box 1835
218 S. Theobald Street
Greenville, MS 38701-0173
(601) 335-2100
Attorneys for Petitioner
Verdia Jones

Certificate

I, Charles Victor McTeer, do hereby certify that I have this day mailed, via United States mail, a true and correct copy of Petitioner's Petition for Certiorari to Hon. Semmes Luckett, 121 Yazoo Street, Clarksdale, Mississippi 38614.

This the day of November, 1982.

CHARLES VICTOR MCTEER

/s/ .....

CHARLES VICTOR MCTEER

UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

No. 80-3535

May 24, 1982

VERDIA JONES,

Plaintiff-Appellant,

—v.—

ROBERT BIRDSONG, *et al.*,

Defendants-Appellees.

Black guidance counselor brought civil rights action alleging race discrimination. Northern District of Mississippi, William C. Keady, Chief Judge, 530 F.Supp. 221, entered judgment for defendants, and plaintiff appealed. The Court of Appeals, Coleman, Circuit Judge, held that plaintiff was not improperly denied her right of jury trial as to her federal and state claims for compensatory and punitive damages.

Affirmed.

Alvin B. Rubin, Circuit Judge, dissented and filed opinion.

Civil Rights—13.14

Plaintiff in racial discrimination case was not improperly denied her right of jury trial as to her federal and state claims for compensatory and punitive damages, where she had repeated opportunities to file motion for jury trial and chose not to do so and never made known to the district judge that she desired a jury trial. Fed. Rules Cir.Proc.Rule 38(b), 28 U.S.C.A.

Charles Victor McTeer, Greenville, Miss., for plaintiff-appellant.

Semmes Luckett, Clarksdale, Miss., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Mississippi.

Before BROWN, COLEMAN and RUBIN, Circuit Judges.
COLEMAN, Circuit Judge.

The opinion of the District Court is reported, *Jones* v. *Birdsong*, 530 F.Supp. 221 (N.D., Miss., 1980).

We heard oral argument in New Orleans on November 4, 1981. Upon consideration of the record, briefs, oral argument, and published opinion of the District Court, we affirm.

We need not here rehash or rephrase the facts as found in the detailed, carefully written District Court opinion. It is quite clear that the findings were not clearly erroneous, Rule 52(a), Federal Rules of Civil Procedure.

Only one point remains for disposition.

Never at any time did Mrs. Jones serve a written demand for trial by jury as required by Rule 38(b) of the Federal Rules of Civil Procedure. Never at any time did she make known to the District Judge that she desired a jury trial. Now, on appeal, she attempts to argue that the District Court improperly denied her the right of a jury trial as to the federal and state claims for compensatory and punitive damages.

We need not decide, and we offer no intimation, as to whether if she had properly asserted it Mrs. Jones would have been entitled to a jury trial as now claimed.

Rule 38(b), *supra*, provides that any party may demand trial by jury of any issue triable of right by a jury by serving a written demand therefor at any time after the commencement of the action and not later than ten

days after the service of the last pleading directed to such issue. Subsection (d) of the Rule provides that the failure of the party to serve a demand as required by the Rule and to *file* it as required by Rule 5(d) waives the right to a jury trial.

In *United States* v. *110 Bars of Silver, Etc.*, 508 F.2d 799 (5th iCr., 1975), *cert. denied*, 423 U.S. 861, 96 S.Ct. 118, 46 L.Ed.2d 89 (1975), we held that the failure to file a Rule 38(b) demand for a jury within ten days from the service of the last pleading waived the right.

This takes us back to *Eastside Church of Chirst, et al.* v. *National Plan, Inc., et al.*, 391 F.2d 357 (5th Cir. 1968), *cert. denied*, 393 U.S. 913, 89 S.Ct. 234, 21 L.Ed.2d 198 (1968), where we find the following:

> "[T]he contention that appellants were denied a jury trial is frivolous. They did not seek a jury trial. They made no objection to proceeding without a jury. The idea of a jury was first raised in this Court through reliance on a request for jury trial made by two of the defendants who are not involved in the cause before us". [Opinion by Judge Griffin Bell].

In the years before the advent of the Federal Rules of Civil Procedure, the Supreme Court had held that where a party is present and represented by counsel and goes to trial before the Court *without objection or exception*, he has voluntarily waived his right to a jury and must be held to the legal consequences of such a waiver. *Kearney* v. *Case*, 12 Wall 275, 79 U.S. 275, 20 L.Ed. 395 (1870); *Perego* v. *Dodge*, 163 U.S. 160, 16 S.Ct. 971, 41 L.Ed. 813 (1896).

Now, let us see what happened in this case.

The defendants filed their answer to the original complaint and timely filed a request for a jury trial for Mrs. Jones' back pay claims, compensatory damages, and puni-

tive damages. Mrs. Jones moved to strike the demand for a jury trial on the back pay issue. The Court responded by denying a jury trial on all issues. *Mrs. Jones raised no objection to this ruling.*

Mrs. Jones then filed an amended complaint. There was no Rule 38(b) motion for a jury trial and none was ever filed. However, at a pretrial conference before a magistrate the plaintiff moved *verbally* for a bifurcated trial of the legal and equitable issues, with a jury trial on the legal issues. The magistrate denied the motion. This action was never called to the attention of the District Judge. There was no objection filed. When the case came to trial on the merits before Judge Keady, the plaintiff said absolutely nothing about the denial of the motion at the hands of the magistrate. Not a word was said about desiring a jury trial. Mrs. Jones now attempts to evade all this by saying that any complaint or objection would have been useless because the Judge had already denied the defendants' request for a jury trial. This is an attempted evasion of the undisputable fact that when the Court made that ruling at an early stage of the litigation the plaintiff had offered no remonstrance or objection whatever, thus leading the Court to believe that she agreed with that result.

Under the circumstances, the plaintiff was under a special duty to speak out about any desire for a jury. Her counsel knew, or was certainly charged with the knowledge, that in the case of *Lynch* v. *Pan American World Airways, Inc.*, 475 F.2d 764 (5th Cir., 1973), in a racial discrimination case which sought reinstatement with back pay, compensatory damages, and punitive damages, the Fifth Circuit held that the trial court properly struck the plaintiff's motion for a jury trial because the action was equitable in nature. Unless the point were raised and unless there was convincing argument to the contrary, Mrs. Jones should have expected that the District Judge would consider himself bound by the ruling in *Lynch.*

In conclusion, we cannot countenance an effort to reverse the District Court from ambush.

As already pointed out, plaintiff sought no review of the magistrate's ruling, which was made after the filing of an amended complaint. We have repeatedly held that in the absence of exceptional circumstances provoking a miscarriage of justice questions that are not presented to or passed on by the trial court (here, the ruling of the magistrate) will not be considered on appeal. *D. H. Overmyer Company* v. *Loflin*, 440 F.2d 1213 (5th Cir., 1971), *cert. denied*, 404 U.S. 851, 92 S.Ct. 87, 30 L.Ed.2d 90 (1971); *Capps* v. *Humble Oil & Refining Company*, 536 F.2d 80 (5th Cir., 1976); *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1684, 48 L.Ed.2d 187 (1975); *Alabama Great Southern Railroad Company* v. *Allied Chemical Corporation*, 501 F.2d 94 (5th Cir., 1974), rehearing en banc, 509 F.2d 539 (5th Cir., 1975).

What it all comes down to is that plaintiff had repeated opportunities to file a Rule 38(b) motion for a jury trial and she chose not to do it. When Judge Keady denied the defendants' motion for a jury trial the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury.

Leaving aside the issue of whether she would have been entitled to a jury if she had properly sought such a trial, we firmly decline the suggestion that the District Court should be cast in error.

AFFIRMED.

ALVIN B. RUBIN, Circuit Judge, dissenting:

Because I think that Mrs. Jones was entitled to rely on the defendants' jury trial demand and that, under the circumstances, her oral motion for a jury trial was sufficient, and because I think that she did not thereafter waive her jury trial right by her conduct, I respectfully dissent.

The right to jury trial is not merely a creature of the rules of civil procedure, but is safeguarded by the Constitution. Thus the right to be heard by a jury of the suitor's peers is a favored right, and its waiver is not to be lightly inferred. *Aetna Ins. Co.* v. *Kennedy*, 301 U.S. 389, 393, 57 S.Ct. 809, 812, 81 L.Ed. 1171, 1180 (1937) ("courts indulge every reasonable presumption against waiver").[1] A federal district judge should not, therefore, be grudging in granting a jury demand. Even when the jury trial demand is not made within the ten days fixed by rule 38, the court in its discretion may order a jury trial. *See* Fed. R.Civ.P. 39(b).[2] We have said that, when such a rule 39(b) motion is filed, "a court should grant a jury trial in the absence of strong and

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[1] *See also* 5 J. Moore & J. Lucas, Moore's Federal Practice ¶ 38.43 (2d ed. 1982); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2321 (1971).

[2] The general rule is that "[a] Rule 39(b) motion is necessary to relieve a party from waiver; the court cannot grant relief on its own initiative." *Mesa Petroleum Co.* v. *Coniglio*, 629 F.2d 1022, 1029 (5th Cir. 1980). In *Swofford* v. *B&W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965), however, we considered the language of rule 39(b), "notwithstanding the *failure of a party to demand* a jury . . . the court in its discretion upon motion may order a trial by jury," and concluded that, when a demand *has* been made the court may exercise its discretion to order a jury trial even in the absence of a motion to the court under rule 39(b). (Emphasis added.)

compelling reasons to the contrary." *Mesa Petroleum Co.* v. *Coniglio*, 629 F.2d 1022, 1029 (5th Cir. 1980). *Accord*, *Swofford* v. *B&W, Inc.*, 336 F.2d 406, 409 (5th Cir. 1964), *cert. denied*, 379 U.S. 962, 85 S.Ct. 653, 13 L.Ed.2d 557 (1965); *Albert* v. *R. P. Farnsworth & Co.*, 176 F.2d 198, 203 (5th Cir. 1949).

The defendants submitted a demand for a jury trial of the plaintiff's claims for backpay, compensatory damages, and punitive damages. Mrs. Jones moved to strike the request for jury trial on the backpay issue, but did not object to the jury trial request for the claims regarding compensatory and punitive damages. The district court judge entered an order denying the right to jury trial on any issue, stating, "it is well settled that there is no right to jury trial in an employment discrimination suit under § 1981 or § 1983 even though claims for compensatory or punitive damages are made." The district judge denied the defendants' motion for reconsideration of the order. Mrs. Jones did not then file any objection to the order.

Mrs. Jones, however, later filed an amended complaint adding a claim under Title VII to her claims for relief under 42 U.S.C. §§ 1981, 1983, the equal protection clause of the fourteenth amendment, and state contract law. At a pretrial conference before a magistrate Mrs. Jones requested a trial by jury on the legal issues and a separate nonjury trial on the equitable claims.[3] The magistrate denied this request, but not on the basis now suggested by my colleagues, that an oral demand was insufficient.[4]

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[3] The pretrial order entered by the magistrate contains the following statement: "Upon consideration of the plaintiff's *motion* to bifurcate trial of the legal and equitable issues in this action and for a trial by jury on the legal issues, plaintiff's said motion is denied." (Emphasis added.)

[4] Backpay is an integral part of the equitable remedy of reinstatement. *Hopkins* v. *Sweeny Indep. School Dist.*, 427 F.2d 319, 324 (5th Cir. 1970), *cert. denied*, 400 U.S. 991, 91 S.Ct. 451, 27 L.Ed.2d 439 (1971). Therefore, the district court was correct in

[Footnote continued on following page]

Each party to this case has, therefore, demanded a jury trial on the issues of compensatory and punitive damages at least once. The majority holds, however, that Mrs. Jones may not raise the jury trial issue on appeal because, having presented her jury trial demand to the magistrate, she failed again to urge it before the district judge.[8]

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denying the demand for a jury trial on the backpay issue. Compensatory and punitive damages present legal issues and are proper issues for jury determination. *Whiting* v. *Jackson State Univ.*, 616 F.2d 116, 122 (5th Cir. 1980). This circuit, however, "has not yet decided whether actual or punitive damages are recoverable under Title VII." *Id.* at 122 n.4. *See Claiborne* v. *Illinois Cent. R.R.*, 583 F.2d 143, 154 (5th Cir. 1978) ("Pretermitting the issue whether an award of punitive damages under Title VII alone would be proper, we are persuaded that such an award under section 1981 is permissible, even when the section 1981 claim is joined with Title VII claims"), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 303 (1979).

The majority states that *Lynch* v. *Pan American World Airways, Inc.*, 475 F.2d 764 (5th Cir. 1973) (per curiam), held that "the trial court properly struck the plaintiff's motion for a jury trial because the action was equitable in nature." Page 25, *supra*. This statement, I respectfully submit, misconstrues the holding of *Lynch*. The court in *Lynch* stated that reinstatement with backpay was an equitable claim, not to be determined by a jury. The court also stated that the plaintiff may not "by making unsupported allegations for compensatory and punitive damages—unilaterally alter the genre of the proceeding." *Id.* at 765. *Lynch* does not suggest that a jury should be denied if there is a good faith demand for compensatory damages with some evidentiary support. There is no indication in the instant case that Mrs. Jones's claims for compensatory and punitive damages are either unsupported or designed unilaterally to alter the mode of trial.

[8] The majority states: "We have repeatedly held that in the absence of exceptional circumstances provoking a miscarriage of justice questions that are not presented to or passed on by the trial court (here, the ruling of the magistrate) will not be considered on appeal." Page 25, *supra*. The cases cited by the majority all deal with the general proposition that issues not presented to the trial court may not be argued on appeal. The cases do not discuss the more specific question of whether an issue raised before a magistrate is considered to be raised before the "trial court."

Although there is not much authority on the point, it appears that Mrs. Jones may indeed have waived her right to contest the magistrate's denial of her jury trial request in this appeal. The literal language of the statute conferring power on magistrates provides, in relevant part: "a judge may designate a magistrate to hear and determine any pretrial matter pending before the court. . . . A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that a magistrate's order is clearly erroneous or contrary to law." 28 U.S.C.A. § 636(b)(1)(A) (West Supp. 1982). *See Merritt* v. *International Bhd. of Boilermakers*, 649 F.2d 1013, 1017, 1019 (5th Cir. 1981) (§ 636(b)(1)(A) pretrial orders are not subject to de novo determination, but party waives arguments about the magistrate's ruling if the order is not appealed to the district court); *United States* v. *Reddick*, 620 F.2d 606, 607 (7th Cir. 1980) (Direct appeal to the circuit court from a § 636(b)(1)(A) order of a magistrate is prohibited; requiring a party "to seek intermediate review in a district court or to renew the motion in that forum represents the better rule."); *see also* 7B J. Moore, M. Waxner, H. Fink & D. Epstein, Moore's Federal Practice § 636 (2d ed. 1981) ("Congress intends that the magistrate shall have the power to make a determination of any pretrial matter (except the enumerated dispositive motions) and that his determination set forth in an appropriate order shall be 'final' subject only to the ultimate right of review by a judge of the court.").*

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* *Cf. Nettles* v. *Wainwright*, 656 F.2d 986, 987 (5th Cir. 1982) (en banc). (In a ruling by a magistrate under § 636(b)-(1)(B), failure to object to the magistrate's report and recommendations prior to the district court's acceptance of such constitutes a waiver of the right to appeal the recommendations contained in the report if the magistrate informs the parties that objections must be filed within ten days of the filing of the magistrate's report.) *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980) (waiver under § 636(b)(1)(B)).

Even if we assume that Mrs. Jones waived her right to object to the magistrate's denial of her jury demand by failing to appeal his ruling to the district court judge, she is still entitled to rely on the jury trial demand made by the defendants. *Southland Reship, Inc.* v. *Flegel*, 534 F.2d 639, 643 (5th Cir. 1976) ("In the district court, the appellees made a timely motion for a jury trial pursuant to Rule 38, Fed. Rules of Civ.Proc. . . . The appellant was, of course, entitled to rely on this demand."); *Calnetics Corp.* v. *Volkswagon of America, Inc.*, 532 F.2d 674 (9th Cir. 1976), *cert. denied*, 429 U.S. 940, 97 S.Ct. 355, 50 L.Ed.2d 309 (1976); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2318, at 85 (1971).

Furthermore, rule 38(d) prohibits withdrawal of a demand for a jury trial without the consent of all the parties. Fed.R.Civ.P. 39(a)(1) buttresses this by requiring that, if a jury trial has been demanded, the parties must *consent* to a nonjury trial "by written stipulation filed with the court or by an oral stipulation made in open court and entered in the record."

While consent to a nonjury trial need not be explicit, and the right to a jury trial may be waived by the conduct of the parties,[7] there must be at least some unambiguous indication of that consent, or, as it is sometimes called, a waiver. In *Southland Reship, Inc.* v. *Flegel*, 534 F.2d 639 (5th Cir. 1976), we found an implied waiver of the right to a jury trial, but under a quite different factual situation than that presented in the instant case. A hearing for preliminary and permanent injunctive relief was scheduled and held by the district court. There were also issues of damages. "Thus," as we there said, "in the absence of a waiver, the proper procedure would be for the district court to hold a hearing

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[7] *See* 9 C. Wright & A. Miller, *supra* at § 2321 ("The right to jury trial may also be waived by conduct or agreement of the parties.")

on the preliminary injunction, then to try the legal issues before a jury, and then to hold the hearing itself on the permanent injunction." *Id.* at 644. When the consolidated hearing on the preliminary and permanent injunction began, counsel for the defendants noted the request for a "jury trial on [damage claims] *if, indeed, we ever reach that point.*" *Id.* (Emphasis added). Evidence at the hearing was not restricted to the injunctive issues, however, but was adduced on all issues. The court then requested proposed findings of fact and conclusions of law from each party, and the plaintiff submitted its proposals without requesting a jury trial on liability or noting any objection to the procedure. "[O]nly after the order went against them did they raise this issue." *Id.*

We held that "on the facts of this case," a formal oral stipulation waiving the jury was not necessary. We based this holding on three factors: (1) plaintiff's counsel had over a month after consolidation of the injunctive hearings to object to the lack of a jury on the liability issue but did not do so, (2) at the pre-hearing colloquy with the district judge, defense counsel on the record "quite clearly waived their right to a jury trial on liability while retaining their right to a jury trial on damages," and (3) the plaintiff submitted proposed findings of fact and conclusions of law without objecting to the lack of a jury on the liability issues. *Id.* "This course of conduct represents all too clear an acquiescence *in the trial of liability* to the court without a jury." *Id.* (Emphasis added). There was, of course, no waiver of the right to a jury trial on damages, but that issue was mooted by the finding that there was no liability. *Southland Reship*, therefore, rests on all three factors listed above including the clear waiver of a jury trial on the liability issue on the record. No such waiver and neither of the additional circumstances relied upon can be found here.

The defendants requested a jury trial and Mrs. Jones is entitled to rely on that request. The district judge, as well as the magistrate, denied a jury trial on all issues.

While the district judge was never presented with an appeal of the magistrate's ruling, he was not ambushed by Mrs. Jones. He knew that a jury trial was desired and he denied that right because he thought that the litigants were not entitled to a jury trial, rather than because of any procedural failing. Mrs. Jones did not wait until the trial was over to make her position known. She was not denied a jury trial for failure to present a demand in writing or for the insufficiency of the defendants' demand.

There was thereafter no waiver of the right to jury trial, oral or written. Mrs. Jones simply complied with the court's order. Her counsel's explanation of his client's failure to expostulate further appears to me to be adequate to negate waiver.[a]

It would have been better had Mrs. Jones's counsel expressly appealed the magistrate's denial of a jury trial and had he objected expressly thereafter to proceeding without a jury, but, in view of the favored position of the jury trial, I do not find either Mrs. Jones's failure to appeal or her failure to file a formal objection on the record in this case sufficient to constitute a waiver of her right to trial by jury on the legal issues. What the Constitution guarantees, courts should not lightly find abandoned.

For the foregoing reasons, I respectfully dissent.

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[a] He states in his brief:

> After three attempts to have a jury trial it was adamantly [*sic*] clear to both parties that no jury trial would be had in this cause absent intervention by a higher court. . . . After three attempts to gain a jury trial there was no need to risk the Court's ire.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

No. DC 77-94-K

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, LEON PORTER, JR., GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., Individually and in their official capacities as Members of the Board of Trustees of the Clarkdale Municipal Separate School District, ROBERT M. ELLARD, Individually and in his official capacity, Superintendent of Education on the Clarksdale Municipal Separate School District, TERRY MOOD, Principal Clarksdale High School,

Defendants.

Memorandum Opinion

On September 23, 1977, plaintiff Verdia Jones, a black former employee of the Clarksdale Municipal Separate School District, instituted this employment discrimination suit against the defendants, Robert Birdsong, Leon Porter, Jr., Glenn D. Gates, Mayo Wilson, Jessie G. Hughes, Jr., members of the school board in their official capacities and individually, Robert M. Ellard, superintendent of Education, in his official capacity and individually, and Terry Mood, principal of the Clarksdale High School, seeking reinstatement, back pay, compensatory and punitive damages, attorney fees and costs. The complaint as amended alleged federal jurisdiction under 28 USC §§ 1331, 1343(3) and (4) for causes of action arising under Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. § 2000e et seq., the Civil Rights Statutes, 42 U.S.C. §§ 1981 and 1983, the Equal Protection Clause of the fourteenth amendment, and the desegrega-

tion order of this court entered January 10, 1970, in *Henry* v. *Clarksdale Municipal Separate School District*, No. DC 64-28-K, which incorporated the faculty and staff provisions mandated by *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969). By joint answer, defendants denied the charges of racial discrimination, and asserted that the plaintiff was employed as a faculty member until the end of the school year 1976-77, that she was offered a contract for the ensuing year 1977-78, but that she voluntarily rejected the tendered reemployment and thereafter ceased to be in defendants' employ.

In her amended complaint, plaintiff stated her grievances at length in eight counts. Count I charged that plaintiff began her employment with the defendant board as a teacher-counselor in 1962, a year later she became a full-time guidance counselor at the all-black Higgins High School, and that she held this position until February 1970. At that time, pursuant to the court order mandating the merger of the formerly separate white and black junior-senior high schools, she was reassigned as a guidance counselor to Clarksdale High School, but demoted in the reassignment since she was given less job responsibility and assignments requiring a lesser degree of skill than she had previously exercised at the Higgins position and which her white counterpart, James Grimmett, continued to exercise as guidance counselor at Clarksdale High School.

Count II alleged that in 1974 Grimmett, white guidance counselor, was promoted to the assistant principalship of Clarksdale High School and the school board hired Robert Eavenson, also white, to fill his position, and that after Eavenson's employment, defendants continued the ongoing demotion of plaintiff because of race by assigning her subordinate jobs and inferior professional job responsibilities as compared to those held by Eavenson.

Count III charged that plaintiff was further demoted and discriminated against because of her race in the

school year 1976-77 by being given a contract of employment conditioned upon availability of Title I funds, a provision which denied her substantial job security, and that she was required to perform duties as a Migrant Career Awareness counselor, a position involving less responsibility and less skill than the post which she had held at Clarksdale High School.

Count IV averred that during the next school year, 1977-78, she was further demoted and discriminated against on the basis of race by being offered a contract of employment conditioned upon availability of Title I funds and which would have required her to perform duties involving less responsibility and requiring less skill than her former position as guidance counselor at Clarksdale High School, and, accordingly, she rejected this contract.

Counts V and VI asserted that defendants maintained a policy and practice of offering white employees job assignments, promotions and positions paying additional money without making such offers to black employees, including the plaintiff, who requested such job promotions and positions, but was denied same because of her race.

Count VII charged that prior to her rejection of the 1977-78 employment contract which contained objectionable terms, defendants offered and she accepted another employment agreement not conditioned upon the availability of Title I federal funds, but that the defendants have failed and refused to honor that contract, as a consequence of which plaintiff suffered damages for salary loss of $13,083 for the 1977-78 school year.

Count VIII charged that as a result of defendants' racially discriminatory employment practices plaintiff has suffered and will continue to suffer damages resulting from her nervousness and mental anguish attendant upon her loss of professional status as a guidance counselor.

After extensive discovery, the parties appeared before a United States Magistrate for pretrial conference held March 16, 1979. However, a pretrial order containing lengthy statements of claims and defenses, together with

certain factual stipulations, was not submitted to the court until July 19. Trial scheduling was delayed because of illness of counsel. On February 19, 1980, the court conducted a 4-day evidentiary hearing. Illness of counsel again delayed prompt submission of post-trial briefs, which the court has now considered and finds the case ripe for disposition. Incorporated herein are findings of fact and conclusions of law required by Rule 52(a), F.R. Civ.P.

I. FINDINGS OF FACTS

Background.

On January 10, 1970, this court entered an order in the Clarksdale school desegregation case, *Henry* v. *Clarksdale Municipal Separate School District*, No. DC 64-28-K, mandating the establishment by February 1, 1970, of a single high school to be known as Clarksdale High School and housed in the Bobo and Dorr buildings previously occupied by the all-white Clarksdale Junior-Senior High School. The Clarksdale Junior High School was housed in the Higgins High School complex, formerly used as the all-black junior-senior high school. *Singleton*'s standard provisions for employment of faculty and staff during the desegregation process were incorporated in the court's order.

Plaintiff, now 49 years old, holds a Bachelor's degree from Xavier University (1951), a Master's degree in guidance from Indiana University (1957), and an educational specialist degree in guidance and psychometry from Delta State University (1977). She is licensed as guidance counselor, classroom teacher and psychometrist.

Plaintiff was first employed by the defendant board as a teacher-counselor in 1962; a year later she became a full-time guidance counselor at the all-black Higgins High School and continued in that position until February 1970. Upon entry of the desegregation order, plaintiff was reassigned as a guidance counselor in Clarksdale High School. From February 1970 forward, plaintiff was continued as

a guidance counselor at Clarksdale High School with James Grimmitt, white, who had been employed as a guidance counselor in Clarksdale High School prior to the desegregation order. Plaintiff and Joseph Hardy, black, the former principal of Higgins High School who was reassigned as assistant principal of Clarksdale High School, had adjoining offices in the same suite in the Dorr Building together with Helen Green, a white secretary. James Grimmett had his office in the Bobo Building in a suite occupied also by Robert Ellard, then principal of Clarksdale High School, with a white secretary. The Dorr and Bobo buildings were located on the same campus and connected by a covered arcade or walkway. The records of black students were kept in the Dorr suite until Helen Green was transferred to the principal's office in the Bobo building in 1972. Thereafter, all student records were kept in a vault located in the principal's office. Plaintiff had difficulty getting access to student records after this transfer.

Plaintiff continued to be employed as a high school guidance counselor for 12-month periods for the next four years. She received the same annual salary as Grimmett, who was also annually reemployed. In addition to regular salary, Grimmett, however, received certain compensation for coaching tennis and basketball. For the next ensuing two years, plaintiff was employed as occupational orientation teacher and counselor at Clarksdale High School for an 11-month period. She taught three periods of occupational orientation daily and served as counselor for two periods. During these years, Eavenson, Grimmett's replacement as a counselor, was hired at a lesser salary than plaintiff received. However, Eavenson had no teaching duties and devoted his entire time to counseling.

For the school year 1976-77, plaintiff was employed as a career awareness counselor in the Migrant Program for 10 months at a greater salary than Eavenson received as a guidance counselor at Clarksdale High School. This employment transferred plaintiff out of Clarksdale High School to work as counselor with 6th, 7th and 8th grade

students. In the spring of 1977 plaintiff was offered a contract of reemployment as career awareness counselor for 10 months for the school year 1977-78 which she refused to accept because the contract contained a stipulation in ¶ 6 reading as follows: "In the event that funds are not furnished to this school district, or cease to be furnished under Title I of Congressional Public Law 89-10, 92-318, 93-380, this contract shall terminate." All other contracts made by the school board for services performed under Title I programs had similar clauses. Approximately 75 employees, almost equally divided between blacks and whites, were employed under such contracts. When plaintiff objected to this provision, Superintendent Ellard sought without success to have the school board waive its inclusion in the agreement. Plaintiff was unwilling to sign a new contract. In September 1977, Superintendent Ellard requested plaintiff to reconsider her decision not to accept a renewal contract for 1977-78 containing the required ¶ 6, but she rejected such request. Since plaintiff left the defendants' employ, no one else has been hired as a guidance counselor at the Clarksdale High School.

Guidance Counselor at Clarksdale High School.

Plaintiff was employed in this capacity from the date of the court-ordered reassignment until June 30, 1976, a period of six and one-half years. She served under three high school principals, Robert Ellard (1970-72), Sam Kendricks (1972-74), and Terry Mood (1974-76). Prior to the court order, Clarksdale Junior-Senior High School had two counselors and Higgins Junior-Senior High School also had two counselors. After the consolidation of the three-grade high school, student enrollment increased to 865; of that number 480 were white students previously attending Clarksdale High School, while 385 were blacks who were transferred from Higgins. Two counselors, Grimmett and plaintiff, were assigned to the high school and two counselors were assigned to the junior high school. There was no reduction in the number of counselors em-

ployed in the high school, nor did any discharges occur in the faculty of any school because of the resignation of 28 teachers of both races.[1] The greatly increased high school student population rendered it necessary to utilize not only the Bobo building which had previously served as the all-white high school but also the Dorr building, formerly occupied by the white junior high school students and staff. Grimmett continued to have his office in Bobo, adjoining the principal's outer office, where records of white students were kept in a vault. Grimmett knew the vault combinations but plaintiff did not. Plaintiff, placed in the Dorr building, had easy access to the records of the transferred black students until such records were moved to the Bobo vault several years later. Having readily available student records was important to the counselor since a principal function was to direct students in career preparation based on course work. After the records transfer plaintiff was disadvantaged in serving students who sought her counseling. Their records had to be sent to her Dorr office, upon plaintiff's request. She was further handicapped when the assistant principal and his secretary moved to the first floor suite in the Dorr building when it was vacated by the superintendent and his staff, which left plaintiff alone in an upstairs office, without ready secretarial service. Yet plaintiff did not ask to move her office to Bobo, which was only a two minute walk distant from Dorr. Though the selection of a counselor was a student's choice, teachers often referred students to a particular counselor, and several students thought Grimmett was the only counselor at the high school. Plaintiff felt that Grimmett's more prominent location, which displayed a counselor sign, was an unfair preference. This arrangement of separate offices for two counselors was criticized by a team of educational experts who recommended combining them to prevent duplicative services and provide equal secretarial service, and remov-

[1] These statistics are taken from the opinion in *Hardy* v. *Porter*, 443 F. Supp. 1164 (N. D. Miss. 1977), *aff'd* 613 F.2d 112 (5th Cir. 1980).

ing both counselors from the principal's office, which was more often associated with student discipline than career development. This recommendation was never carried out, for Ellard thought it was a wise practice to have the high school principal and a counselor in Bobo and the assistant principal and a counselor at Dorr. He defended the arrangement as providing greater availability of counseling to students as well as more privacy.

Because of lack of specific policies, the two counselors operated somewhat independently of each other, with each pursuing his or her primary interest. The evidence is sharply in dispute as to what extent plaintiff performed the normal duties as a guidance counselor. Notwithstanding plaintiff's feeling that she was being slighted, she regularly had teachers' master schedules; she was introduced to the students as a counselor at orientation seminars; she assisted in the tasks of registering, scheduling and testing many students. Plaintiff had available as many college manuals as Grimmett. She participated as a counselor in college day and career day programs. The court is convinced that the physical layout of her office accounted for many of the irritating problems which plaintiff encountered during this period. For example, the counselor's mail box was located near Grimmett's office, and this often caused delay to plaintiff in receiving mail. College recruiters frequently appeared at the principal's office to interview students with little, if any, notice to plaintiff. Students' correspondence courses during summer sessions were largely handled by Grimmett, although plaintiff was not precluded from performing this voluntary assignment. Intercom messages emanating from the principal's office , and often prepared by Grimmett, tended to feature his name unless plaintiff prepared separate messages to the students. During summer sessions, one entrance to the Dorr building would often be closed, making it more difficult to reach plaintiff's office. Finally, plaintiff felt that she had poor communications with the high school principals, yet she was highly rated as a capable counselor by all high school administrators; and

each year she was recommended by her principal for re-employment. The two counselors received virtually the same compensation.

The court finds as a fact that plaintiff during her employment at Clarksdale High School as guidance counselor had the usual and ordinary responsibilities of the position and performed tasks requiring the skills of a professionally trained counselor. True enough, she did not perform all duties for all high school students as she had as a Higgins' counselor, but that was hardly possible with a greatly enlarged student body where cooperative assistance between the two counselors became a necessity. The court also finds as a fact that separate offices for two counselors was the cause of friction and certain administrative problems naturally expected from such an arrangement, but this as well as lack of better direction from the high school principals to coordinate the work between the two counselors was the result of poor and inadequate school planning, not of racial motivation. From our evaluation of plaintiff's lengthy testimony, it is evident that she allowed numerous small things apt to occur in any school operation to become magnified as working against her.

At the end of the school year 1974, Superintendent Ellard decided that it would be beneficial to institute occupational orientation classes at Clarksdale High School and the course could be best taught by a guidance counselor. By this arrangement, state funds could be obtained to pay a portion of a counselor's salary, which was otherwise payable from local school funds. Terry Mood, then principal, recommended that plaintiff teach the course. Plaintiff was scheduled to teach three class periods. The course was first a required subject for all students taking home economics and shop, later it became elective. Ellard regarded this assignment as a good opportunity for the counselor to have direct contact with many students having vocational interest, but plaintiff regarded teaching duties as a demotion. Plaintiff believed that teaching three class periods daily deprived her of 60% of her time

for individual student counseling and also that under the 1974-75 contract her work would be reduced to an 11-month period instead of a full year, with some loss of pay. She objected to change in the duty date, claiming it deprived her of an earned vacation under the previous year's contract. Accordingly, plaintiff protested the 1974-75 contract to Ellard and requested a conference with the school board to present her grievances. She thought she was being discriminated against by being selected to teach occupational orientation since Robert Eavenson, the newly hired white counselor who moved into Grimmett's office, was free to devote his entire time to counseling. When Ellard refused to arrange a board meeting for plaintiff, she engaged attorneys at Jackson, Mississippi, to represent her interests. No adjustments were made as a result of her complaints. Needing work, plaintiff accepted teaching duties and continued to serve as counselor. Her teaching and counseling assignments were performed for the following year 1975-76, under an identical contract which was renewed without incident. Plaintiff, however, continued to express her feelings to school officials that she had been reduced to a "three-fifth teacher" status, with only limited counseling responsibilities. She was still maintained in an inconveniently located office without direct access to records and secretarial service. Plaintiff consistently considered her job in teaching occupational orientation as a further demotion in employment which she attributed to her sex and race. From the evidence, some students came to regard plaintiff as a classroom teacher and did not realize that she was also a guidance counselor. Plaintiff was qualified to teach occupational orientation, having received such training previously at the school board's expense. Eavenson was likewise qualified to teach the course. Because of her experience and training, plaintiff's credentials as a counselor were superior to Eavenson's. Eavenson, in fact, looked to plaintiff for advice and leadership. Principal Mood, on several occasions, urged that plaintiff and Eavenson cooperate on joint counseling programs. As a consequence,

plaintiff had greater rapport and understanding with Eavenson than she had previously enjoyed with Grimmett. With respect to the 11-month employment, all counselors beginning August 1, 1974, were hired for like periods, and plaintiff was not singled out for different treatment in this regard. The court finds as a fact that teaching occupational orientation to students interested in career opportunities was of equal importance to individual counseling, and that such an assignment did not reduce the responsibility of the guidance counselor.

Career Awareness Counselor for School District.

In the spring of 1976 Ellard discussed with plaintiff the possibility of leaving her job at Clarksdale High School to be employed by the school district as a career awareness counselor with offices in the Myrtle Hall building, which housed an elementary school. This new program would bring the career awareness counselor into contact with students in the 6th, 7th and 8th grades throughout the city, and the counselor would be required to visit various schools in the course of counseling activities. Although this opportunity appealed to plaintiff, she did not immediately understand that the job was to be federally funded by Title I, nor that she would work under the direction of William Metcalf, the Title I federal fund coordinator. Upon the signing of her 1976-77 employment contract, no reference was made to the fact that she would be paid from Title I funds. According to Ellard, that provision was inadvertently omitted from the written agreement. Plaintiff entered upon her new job, and soon learned that she would be working under Metcalf and would receive compensation under the Title I program and not district school funds. The career awareness program was a pilot program which dealt with migrant students. Metcalfe found her work very acceptable, but plaintiff did not find it to be as satisfying as her previous position at Clarksdale High School. In the spring of 1977 Ellard tendered plaintiff a new contract of employment as career awareness counselor for the next year, 1977-78.

The first document did not contain the correct salary (13,083) and she returned it unsigned to the superintendent. A second document containing the correct salary but without a clause stating that her employment was conditioned upon the availability of Title I funds was sent to plaintiff. She signed this contract and returned to the superintendent for completion. Soon thereafter she received another document containing the Title I clause. Plaintiff objected to that provision. Ellard tried to get the school board to remove the offensive paragraph from the contract, but the board refused on the ground that all Title I employees were employed under such understanding. Plaintiff persisted in rejecting the tendered contract, and she was not rehired by the board. Indeed, the Migrant Program which Ellard had envisioned for next school year was cancelled in August 1977. Even so, Ellard notified plaintiff that he wanted to retain her in the school system and offered her continued employment as an elementary guidance counselor, a position which was also federally funded under Title I. Plaintiff and her attorney conferred with Ellard about the offer, and she declined employment so long as it was a Title I job and insisted that she be rehired as a guidance counselor paid from general school funds.

Other Job Opportunities.

Plaintiff complained that she was not offered the jobs of drug consultant and psychometrist although these positions were filled by others while plaintiff was still an employee of the Clarksdale schools. However, plaintiff did not apply for either position, or make known to the school officials that she was interested in employment other than as counselor.

In the summer of 1977, the board opened a new vocational-technical center (vo-tech) under the direction of Carl Keen. This brought about the need for a technical vocational guidance counselor to work as part of Keen's staff. Plaintiff made inquiry of Ellard about obtaining the position. According to plaintiff, Ellard made no re-

sponse, but Ellard denied that and testified that he suggested she contact Keen. The court finds as a fact that plaintiff was directed to apply to Keen and that she failed to do so. Keen first recommended an applicant from Alabama, who eventually declined the job, and Keen made no attempt to fill the position after school opened in the fall of 1977. In March 1978, after plaintiff was no longer a school employee, Ellard advertised the vacancy through the school system. Keen received applications from Varner Rencher, a black guidance counselor, Dorman Howell and Roger Pitt, white counselors. With her qualifications, plaintiff would have secured a temporary permit to act as vocational guidance counselor, but she never applied to Keen, and hence was not interviewed for the job. Keen recommended Pitt for the new position, and he was hired by the board at an annual salary of approximately $13,000. Keen preferred Pitt because of his background in adult education since the vo-tech center was offering 14 classes in adult education. In addition, Pitt was working on his Ph.D. degree at Mississippi State University and came recommended by Dr. Norman of the State Department of Vocational Education.

After leaving the employment of the Clarksdale public schools, plaintiff in October 1977 was employed as vocational counselor and later as manpower director of Coahoma Opportunities, Inc., at a salary of $13,000 annually, payable $500 biweekly. She remained in the employ of this agency until November 1979, when she was terminated for insubordination.

Plaintiff testified at trial that she had suffered great emotional distress from her feelings of rejection and discrimination in her employment at the Clarksdale schools, and that she experienced episodes of depression, insomnia and anxiety. Upon her attorney's recommendation, she consulted Dr. Gilbert McVaugh, a psychologist, in the fall months of 1978 for examinations and received therapy treatment from him in July 1979. The psychologist was of the view that plaintiff was suffering from an emotional

condition akin to combat fatigue and that she was overwhelmed by a feeling of helplessness. He attributed this condition to plaintiff's beliefs that her rights had been denied and that her frustrations would subside only upon her realization that she was treated fairly.

II. CONCLUSIONS OF LAW

Singleton Claim.

In *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1969) (en banc), *rev'd in part on other grnds sub nom Carter* v. *West Feliciana Parish School Board*, 396 U.S. 290, 24 L ed 2d 477 (1970), the Fifth Circuit Court of Appeals responded to the Supreme Court's mandate in *Alexander* v. *Holmes County Board of Education*, 369 U.S. 19, 24 L ed 2d 19 (1969), that school districts immediately begin to operate unitary schools and established certain guidelines for school desegregation. Realizing that the desegregation of school districts could result in the loss of job positions due to the consolidation of dual schools and/or the loss of student enrollment, the court adopted standards to insure that any reduction in personnel did not operate to exclude or otherwise discriminate against blacks in the establishment of the unitary system, as follows:

> If there is to be a reduction in the number of principals, teachers, teacher-aides, or other professional staff employed by the school district which will result in a dismissal or demotion of any such staff members, the staff member to be dismissed or demoted must be selected on the basis of objective and reasonable non-discriminatory standards from among all the staff of the school district. In addition, if there is any such dismissal or demotion, no staff vacancy may be filled through recruitment of a person of a race, color, or national origin different from that of the individual dismissed or demoted, until each displaced staff member who is qualified has had an opportunity to fill the vacancy and has failed to accept an offer to do so.

> Prior to such a reduction, the school board will develop or require the development of nonracial objective criteria to be used in selecting the staff member who is to be dismissed or demoted. These criteria shall be available for public inspection and shall be retained by the school district. The school district also shall record and preserve the evaluation of staff members under the criteria. Such evaluation shall be made available upon request to the dismissed or demoted employee.

Singleton, supra, at 1218.

Plaintiff claims her *Singleton* rights were violated since the school officials demoted her by requiring her to teach occupational orientation, then by directing that she serve as a career awareness counselor, and lastly by asking her to be an elementary school counselor.[2]

The burden is on the plaintiff to show that the strict standards enunciated in *Singleton* are applicable to her claims. *Lee* v. *Pickens County School System*, 563 F.2d 143, 145 (5th Cir. 1977). To be entitled to invoke *Singleton's* requirements, plaintiff must prove "a reduction in personnel because of desegregation, . . . resulting in demotion." *Id.* at 145-46 (footnotes omitted). Even assuming that the school system was still in the process of desegregation during the times when plaintiff was assigned teaching and other tasks,[3] we hold that plaintiff has failed to establish either a reduction in force or resulting demotion.

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[2] She also maintains she was demoted by being required to serve as assistant to the white counselor and was not allowed to perform many of her duties at Higgins. We have found as a fact, however, that plaintiff's duties were comparable to the white counselor's and that any difference in job tasks was necessitated by a larger student body, requiring the division of counselor duties and by physical factors such as office location in the Dorr building.

[3] *See Lemon* v. *Bossier Parish School Board*, 444 F.2d 1400, 1401 (5th Cir. 1971).

Singleton applies only when school personnel are displaced as a result of desegregation. *E.g.*, *Lee* v. *Chambers County Board of Education*, 533 F.2d 132, 135 (5th Cir. 1976). We have found as a fact that no reduction in the number of counseling positions occurred after desegregation and that no staff member was discharged.[4]

Moreover, plaintiff failed to prove she was demoted as defined by *Singleton* as follows:

> "Demotion" as used above includes any reassignment (1) under which the staff member receives less pay or has less responsibility than under the assignment he held previously, (2) which requires a lesser degree of skill than did the assignment he held previously, or (3) under which the staff member is asked to teach a subject or grade other than one for which he is certified or for which he has had substantial experience within a reasonably current period. In general and depending upon the subject matter involved, five years is such a reasonable period.

Singleton, *supra*, at 1218. As the Fifth Circuit has stated, "[t]he real gist of demotion is a reduction in responsibility." *Lee* v. *Macon County Board of Education* (*Muscle Shoals*), 453 F.2d 1104, 1109 (5th Cir. 1971). Since plaintiff's reassignment did not result in the payment of lower wages and since she was certified to teach vocational guidance classes, plaintiff must prove that her duties were less responsible, required less skill, or constituted a position for which she was not substantially experienced in order to recover under *Singleton*. This she failed to do.

As to the occupational orientation class which plaintiff was required to teach from 1974 to 1976, we have found

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[4] Plaintiff's argument that she was reduced from a full-time counselor to a two-fifth counselor fails for the same reason that her claimed "demotion" argument discussed *infra* fails, i.e., her three-fifths teaching duties constituted counseling services to students in a classroom setting.

as a fact that this assignment was of equal importance to individual counseling and did not reduce her responsibility or prestige as a counselor. She had received specific training to do such teaching. We similarly find that the job did not require less skill and that plaintiff was substantially experienced to teach the course, since it in effect differed from her past counseling experience only inasmuch as she was counseling groups of students as opposed to individuals. School administrators are entitled to exercise responsible professional judgment in the assignment of personnel to conduct the changing course work offered in their schools, without interference from the federal courts.

The career awareness counselor's position was likewise essentially equivalent to plaintiff's past work as a counselor. It was certainly a reasonable assignment for the superintendent to make. It appears that this position enhanced plaintiff's responsibilities since it was a pilot program which required her to visit various schools and come in contact with many students. Although this position was funded through Title I funds, plaintiff suffered no financial detriment, and we cannot fairly conclude that this factor alone is sufficient to constitute a *Singleton* demotion. Indeed, what may be the source of funds—whether federal, state or local—used to pay school personnel can be of no valid concern to anyone who receives full compensation for his employment.

We also find that the district's offering plaintiff an elementary counseling position was not a demotion. We are supported by *Lee* v. *Russell County Board of Education*, 563 F.2d 1159, 1162 (5th Cir. 1977), wherein the Fifth Circuit expressly held that a reassignment from high school to elementary counseling did not constitute a demotion.

Finally, plaintiff's case largely rested on her own testimony to establish a *Singleton* demotion. The several assignments given or offered to plaintiff were in the field for which she was trained and had requisite experience, yet she found each progressively more distasteful. "Sub-

jective impressions as to the desirability of one position over another cannot control our decision of whether there has been a decline in responsibility." *Id. See Flora* v. *Moore*, 461 F. Supp. 1104, 1118 (N. D. Miss. 1978).

Title VII Claims.

Section 2000e-5 of 42 U.S.C. provides that a charge of discrimination must be filed within 180 days of the alleged unlawful employment practice. The Supreme Court has held that failure to file a charge within this time period renders the alleged discriminatory act "an unfortunate event in history which has no present legal consequences." *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 558, 52 L ed 2d 571, 578 (1977).

Plaintiff filed her charge of discrimination on September 14, 1977. Ordinarily, therefore, we would have jurisdiction only over those violations which occurred subsequent to March 18, 1977. *See McArthur* v. *Southern Airways, Inc.*, 569 F.2d 276 (5th Cir. 1978) (en banc).

Plaintiff argues that we may consider all the incidents subsequent to her reassignment at Clarksdale High School in 1970 under the continuing violation theory. *Evans*, however, made clear that "the emphasis should not be placed on mere continuity; the critical question is whether any present *violation* exists." *Evans, supra.* The Fifth Circuit has explained this language as follows:

> Where an employee charges an employer with continuously maintaining an illegal employment practice, he may file a valid charge of discrimination based upon that illegal practice until 180 days after the last occurrence of an instance of that practice. . . . However, where the employer engaged in a discrete act of discrimination more than 180 days prior to the filing of a charge with the EEOC by the employee, allegations that the discriminatory act continues to adversely affect the employee or that the employer presently refused to rectify its past violation will not satisfy the requirement of 42 U.S.C. § 2000e-5(e) that the plaintiff file his

charge of discrimination within 180 days of the discriminatory act.

Gonzalez v. *Firestone Tire & Rubber Co.*, 610 F.2d 241, 249 (5th Cir. 1980) (citation omitted). We are required, therefore, to consider only those alleged violations which occurred after March 18, 1977. If any of those violations were also present prior to that time, we may then consider the past violation also.

During spring 1977 plaintiff was acting as career awareness counselor and was tendered a contract for the same position for the school year 1977-78. She signed a contract document which was not conditioned on the availability of Title I funds, but this contract was not approved by the school board. Subsequently, plaintiff refused to sign another agreement identical to the one she signed except for the inclusion of a Title I clause. Plaintiff was also offered a position as elementary counselor, also funded under Title I. She refused this job, again on the ground that she would be paid for her services with Title I funds. In the summer of 1977, plaintiff inquired about the position of technical vocational guidance counselor although, as we have found, she failed to apply to the proper individual as instructed.

Accordingly, we may consider only plaintiff's claims of disparate treatment in regard to her position as career awareness counseler, the board's offer to employ her as elementary counselor, the Title I provision, the failure to hire her as vo-tech counselor, and her claims of constructive discharge surrounding the 1977-78 contract negotiations.[5]

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[5] Plaintiff also attacks defendants' alleged word-of-mouth hiring and promotion policy as racially discriminatory. However, as we have found that defendants advertised the vo-tech vacancy, the only position plaintiff was allegedly denied during the relevant time period, and that plaintiff was informed of the proper procedure to follow in applying for that position, we hold that she has no standing to mount such an attack. We consider *infra*, therefore, only the limited claim of failure to hire her as a vo-tech counselor, and not defendants' overall hiring and promotion policy.

Disparate Treatment Claims.

Plaintiff claims she was treated differently than white counselors by being required to be a career awareness counselor and by being requested to act as elementary counselor, with her continued employment conditioned on the availability of Title I funds. Plaintiff also claims discrimination by failing to offer her the position of vo-tech counselor and hiring instead an allegedly less qualified white. These claims are of "disparate treatment," which is to be distinguished from claims of disparate impact of racially neutral employment practices. As the Supreme Court has held:

> "Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical although in some situations it can be inferred from the mere facts of differences in treatment.

International Brotherhood of Teamsters v. *United States*, 431 US 324, 335 n.15, 52 L ed 2d 396, 415 n.15 (1977).

Employees are neither expected nor required to treat each employee exactly the same; hence, the "central focus" is whether the alleged discriminatee has been treated "less favorably" "because of race." *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 577, 57 L ed 2d 957, 967 (1978).

Since we have previously determined that the positions of career awareness counselor and elementary counselor are substantially equivalent to a high school counselor's position, we must therefore conclude that she was not treated less favorably than white counselors. As to her contention that her job was less secure than that of white counselors because of the Title I paragraph, plaintiff failed to establish even an inference of discriminatory motive by the inclusion of the paragraph. Indeed, public school teachers in Mississippi have no tenure and are em-

ployed under one year contracts. *Henry* v. *Coahoma County Board of Education*, 246 F. Supp. 517 (N. D. Miss. 1963), *aff'd* 353 F.2d 648 (5th Cir. 1965) (per curiam), *cert. denied*, 384 U.S. 962, 16 L ed 2d 674 (1966). Furthermore, the evidence established that 75 employees, almost equally divided between white and black, were employed under such contracts, and there is no basis for believing that employment of public school teachers under the Title I program evinces racial discrimination.

Plaintiff's claim that she was discriminated against when defendants offered the vo-tech counseling job to an allegedly less qualified white person also fails. The general allocation of proof in a hiring case was established in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 36 L ed 2d 668, 677 (1973), wherein the Court stated:

> The complaint in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants of complainant's qualifications.

Plaintiff, of course, did not apply for the position and therefore fails to meet (ii) above. Nonetheless, in *Teamsters, supra*, the Court noted that failure to apply is not a per se bar to relief. The nonapplicant, however, bears a heavy burden:

> A nonapplicant must show that he was a potential victim of unlawful discrimination. Because he is necessarily claiming that he was deterred from applying for the job by the employer's discriminatory practices, his is the not always easy burden of proving that he would have applied for the job had it not been for those practices. *Cf. Mt.*

Healthy City Board of Education v. *Doyle*, 429 U.S. 274, 50 L ed 2d 471, 97 S. Ct. 568.

Teamsters, supra, at 367-68, 52 L ed 2d at 435.

Plaintiff did not assert any credible reason for her failure to apply for the vo-tech position and the whole evidence reflects that she lacked interest in the vacancy. The evidence affirmatively shows that no one else was hired as high school counselor, occupational orientation teacher or career awareness counselor after plaintiff ceased her employment. Accordingly, plaintiff failed to establish a prima facie case of failure to hire.

Constructive Discharge.

Plaintiff asserts that her rejection of the 1977-78 contract was not voluntary but rather constituted a constructive discharge by defendants. The constructive discharge doctrine has been explained by the Fifth Circuit as follows:

> [I]f the employer deliberately makes an employee's working conditions so intolerable that the employee is forced into an involuntary resignation, then the employer has encompassed a constructive discharge and is as liable for any illegal conduct involved therein as if it had formally discharged the aggrieved employee.

Calcote v. *Texas Educational Foundation*, 578 F.2d 95, 97 (5th Cir. 1978) (quoting *Young* v. *Southwestern Savings & Loan Ass'n*, 509 F.2d 140, 144 (5th Cir. 1975)). The Fifth Circuit has recently held that an analysis of whether constructive discharge exists must proceed "upon an examination of the conditions imposed" upon the employee, and not on whether the employer intended to rid itself of the employee. *Bourque* v. *Powell Electrical Mfg. Co.*, slip op. at 5362 (5th Cir. May 5, 1980). The court stated that to find constructive discharge "the trier of fact must be satisfied that the . . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to

resign." *Id.* (quoting *Alicia Rosado* v. *Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977). In *Bourque* the court held that "discrimination manifesting itself in the form of unequal pay cannot, alone, be sufficient to support a finding of constructive discharge." *Id.* at 5363.

We cannot fairly conclude that a reasonable person in plaintiff's shoes would have found that the working conditions imposed by defendants compelled resignation. Plaintiff did not object to most of these conditions. As to the inclusion of a Title I paragraph in her contract, the fact that approximately 75 persons worked under such contracts, apparently without objection, belies a conclusion that this was an "intolerable" condition of employment. Plaintiff's compensation the last year of her employment in the Clarksdale public schools came from Title I funds, and, if she were in position to object to the source of funds, she is unable to show that her continuing employment as a Title I elementary counselor would have caused her any financial loss. As we stated in *Flora* v. *Moore*, *supra*, at 1118, "[w]hile the court does not sit in judgment on the subjective beliefs of an employee which may influence his or her decision to quit work, mere personal impressions, without more, cannot form the basis for relief under Title VII."

In sum, we find that plaintiff failed to establish a Title VII violation under any theory of relief.[*]

§1981, §1983, Fourteenth Amendment.

Plaintiff's complaint was filed on September 23, 1977. Defendants argue that all claims arising more than a year prior to that date are barred by Miss. Code Ann. § 15-1-29 (1979 Supp.). Our task, of course, is to determine which of Mississippi's limitation periods most appropriately fits plaintiff's claims. *See Johnson* v. *Railway Express*

[*] Our disposition of the Title VII claim obviates a ruling on the individual defendants' motion to dismiss the Title VII claim against them on the grounds that they were not named in the EEOC charge and are not "employers" within the meaning of 42 U.S.C. § 2000e(b).

Agency, Inc., 421 U.S. 454, 462, 44 L ed 2d 295, 302 (1975).

The application of Mississippi statutes of limitation to claims arising under the Civil Rights Act has not been entirely consistent. In *Walton* v. *Utility Products, Inc.*, 424 F. Supp. 1145 (N. D. Miss. 1976), we held that Mississippi's general six-year limitation period contained in § 15-1-49 [7] applies to actions brought under § 1981, although claims for backpay would be barred by the then three-year statute of limitations of § 15-1-29.[8] Our decision was based on the following language used by the Fifth Circuit in *United States* v. *Georgia Power Co.*, 474 F.2d 906, 923-24 (5th Cir. 1973), a Title VII case:

> The right to be free from discriminatory practices in employment is not analogous to the right of action on implied or unwritten contracts. . . . Indeed, it is the *failure* to contract for employment or promotion on an equal basis which gives rise to a Title VII action.

The issue of which statute applies arose again in *Heath* v. *D. H. Baldwin Co.*, 447 F. Supp. 495 (N. D. Miss. 1977). *Heath*, like *Walton*, was a discharge case, and Judge Orma R. Smith, based on *Walton*, found § 15-1-49 to apply. In *Jordan* v. *Lewis Grocer Co.*, 467 F. Supp. 113 (N. D. Miss. 1979), we further considered the issue. The plaintiff in *Jordan* alleged "discriminatory discharge . . . and a general policy and practice of racial discrimina-

---

[7] Miss. Code Ann. § 15-1-49 (1972) provides: "All actions for which no other period of limitations is prescribed shall be commenced within six years after the cause of such action accrued, and not after."

[8] At the time Walton's suit was commenced, Miss. Code Ann. § 15-1-29 (1972) provided:

> Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor and on any unwritten contract, express or implied, shall be commenced within three years next after the cause of action accrued, and not after.

tion by Lewis in its employment practices, including hiring, discharging, promotion and all other terms and conditions of employment." *Id.* at 115. Unlike *Heath* and *Walton*, Jordan's discharge occurred after July 1, 1976, the date on which an amendment to § 15-1-29 became effective. The amendment added a clause, and the text of that section, with the addition underscored, now reads as follows:

> Except as otherwise provided in the Uniform Commercial Code, actions on an open account or account stated not acknowledged in writing, signed by the debtor, and on any unwritten contract, express or implied, shall be commenced within three (3) years next after the cause of such action accrued, and not after, *except that an action based on an unwritten contract of employment shall be commenced within one (1) year next after the cause of such action accrued, and not after.*

The amended portion of the statute led us to conclude as follows:

> In our view, the decision of the Mississippi legislature to add the last clause and the specificity of the clause itself, *i.e.*, a limitation of its application to "unwritten contract[s] of employment," clearly evidence an intent by the legislature to provide the specific limitation statute "for actions analogous to actions based on racial discrimination in employment" which we found previously nonexistent in *Walton*. Thus, as the most appropriate state statute of limitations, § 15-1-29 provides a one-year limitation period within which a plaintiff must file suit under § 1981 after his cause of action has accrued.

Jordan, supra, at 117 (footnote omitted).

The Fifth Circuit recently considered the problem before us in *Truvillion* v. *King's Daughters Hospital*, 614 F.2d 520 (5th Cir. 1980), an appeal from the United

States District Court for the Southern District of Mississippi, which dismissed Ms. Truvillion's refusal to hire claim based on the limitation period of § 15-1-29.[9] In reversing and holding § 15-1-49 applicable, the court stated:

> The [district] court reasoned that "[a] person suing under Section 1981 to enforce his right to be free of discrimination predicates his claim on the right to contract guaranteed in the statute. The contractual nature of a claim under Section 1981 dictates application of the [three year limit for enforcing unwritten contracts]." But the statutory right Ms. Truvillion asserts is not the right to enforce an unwritten contract as the district court assumed. There was no contract of any kind between Ms. Truvillion and the hospital concerning the post of laboratory technician; instead, the hospital allegedly refused for racial reasons to employ her. Ms. Truvillion relies on a statutory right to be free from discrimination. She complains of the refusal of the hospital to deal with her; she does not assert a right arising from an agreement. The complaint sounds in tort, not in contract. *Ingram* [v. *Steven Robert Corp.*], 547 F.2d at 1263.[10] Be-

---

[9] Since the hospital refused to hire Ms. Truvillion in 1972, the three-year statute contained in § 15-1-29 was applied.

[10] *Ingram*, 547 F.2d 1260 (5th Cir. 1977), involved the application of Alabama statutes of limitation to a discharged employee's § 1981 claim. The Fifth Circuit affirmed the district court's application of Alabama's one-year statute which applies to "[a]ctions for any injury to the person or rights of another, not arising from contract, and not herein specifically enumerated." Code of Ala., Tit. 7, § 26. In holding that § 26, and not the sections relating to written or implied contracts, applied to the claims, the court stated as follows:

> Our choice among these statutes will be determined by whether an action for reinstatement and back pay for the employer's discharge of an employee for constitutionally

[Footnote continued on following page]

> cause Mississippi has no statute of limitation designed to cover actions seeking redress for the tort of employment discrimination, the State's catch-all statute is applicable. *See Heath* v. *D. H. Baldwin Co.*, N. D. Miss. 1979, 447 F. Supp. 495, 504. *Walton* v. *Utility Products, Inc.*, N. D. Miss. 1976, 424 F. Supp. 1145, 1147. The statute runs for six years, and does not bar Ms. Truvillion's claim.

Truvillion, supra, at 528. The court noted, however, that a claim for back pay may be determined by the contractual statute of limitations. *Id.*, n.15. Although the court noted that § 15-1-29 was amended in 1976 to limit claims based on an unwritten employment contract to one year, *id.* at 523, n.5, it in no way indicated that its result would differ if the amendment were in effect when Ms. Truvillion's claim arose.

We need not determine whether *Truvillion* applies only to failure to hire cases, whether *Jordan* applies only when the underlying contract of employment is oral, or the effect on the application of a statute of limitation of joining several claims in one action, for the result is virtually the same no matter which analysis we follow.[11]

> prohibited reasons constitutes an action based on contract (*ex contractu*) or on a right arising independently of the parties' agreement (*ex delicto*).
>
> We think it clear that under the circumstances of this case Ingram's assertion of his rights under § 1981 and the fourteenth amendment arose independently of any agreement between him and his employer. Consequently his action was *ex delicto*, and the district court properly applied § 26.

Id. at 1263.

[11] We do note that a perusal of Annot., *What Statute of Limitations is Applicable to Civil Rights Actions brought under 42 USC § 1983*, 45 ALR Fed. 548 (1979), indicates that many more civil rights actions have been held to be governed by general tort statutes of limitaiton than by contract statutes of limitation. In addition, we agree with the First Circuit's statement in *Walden, III, Inc.* v. *Rhode Island*, 576 F.2d 945, 947 (1st Cir. 1978) that the application for one statute of limitations for most if not all civil rights actions would alleviate much confusion and inconsistency.

Jordan holds that the one-year limitation of § 15-1-29 applies to civil rights violations which occur after July 1, 1976, the effective date of the amendment. Thus, plaintiff's claims arising after July 1, 1976, would have to be brought within one year. Since the complaint was not filed until September 23, 1977, we may consider only those post-amendment claims arising after September 23, 1976, As to those claims arising before July 1, 1976, however, *Walton* applies and the six-year statute governs. We may consider, therefore, plaintiff's claims arising from September 23, 1971, until July 1, 1976, and those arising from September 23, 1976, until the date the complaint was filed. Our exclusion from consideration of the time period from July to September, 1976, however, does not bar any of plaintiff's claims, thus the result is the same as if we had held the six-year statute applicable to all of plaintiff's claims.

When §§ 1981 and 1983 are used as a parallel remedy for Title VII violations, the elements of the causes of action do not differ from the Title VII requirements. *Whiting* v. *Jackson State University*, slip op. at 5106-07 (5th Cir. April 28, 1980). Our conclusion that plaintiff's Title VII claims lack merit therefore applies as well to deny recovery for the same claims asserted under §§ 1981 and 1983.

As to those claims asserted independently of Title VII, i.e., the § 1981, § 1983, and fourteenth amendment claims arising from September 1971 until March 1977 (the cut-off date for cognizable Title VII claims), plaintiff must establish purposeful discrimination. *Whiting*, *supra*, slip op. at 5106-07; *Williams* v. *De Kalb County*, 582 F.2d 2 (5th Cir. 1978); *Washington* v. *Davis*, 426 U.S. 229, 240, 48 L ed 2d 597 (1976).

The evidence indicated that the decisions made by school officials concerning the different aspects of plaintiff's employment were fairly arrived at on the basis of administrative judgment as to school needs and consistent

with plaintiff's qualifications and training, and not influenced by plaintiff's race, sex or other impermissible reason.

Plaintiff has consistently assumed she had a right to continue employment in the Clarksdale public schools, and that the failure of the school officials to continue her in the position of high school counselor supports an inference of racial discrimination. This assumption ignores well known case law that in Mississippi public school employees are without job tenure, *Henry* v. *Coahoma County Board of Education, supra; Jennings* v. *Meridian Municipal Separate School District*, 337 F. Supp. 567 (S. D. Miss. 1971), *aff'd* 453 F.2d 413 (5th Cir. 1971); and, when the employee has no reasonable expectation of reemployment, like plaintiff, who had contracts of only one year's duration, the school board may refuse to rehire the teacher for whatever reason, so long as it is not a constitutionally impermissible one. *Thompson* v. *Madison County Board of Education*, 476 F.2d 676 (5th Cir. 1973); *Pickens* v. *Okolona Municipal Separate School District*, 380 F. Supp. 1036 (N. D. Miss. 1974).

Nor may plaintiff rely upon the fact that Clarksdale school officials in *Hardy* v. *Porter*, 443 F. Supp. 1164 (N.D. Miss. 1977), *aff'd* 613 F.2d 112 (5th Cir. 1980), were held to have framed a racially discriminatory policy in employing administrators in formerly all-white schools of the district. Plaintiff has not been employed as an administrator in the Clarksdale schools or elsewhere, nor does the evidence show that she has ever sought an administrative position. The considerations governing *Hardy v. Porter* are not present in this case. Another argument advanced by plaintiff's counsel is that certain annual reports filed with the court by the school district contain errors or inaccuracies with respect to the number of class periods which plaintiff taught as counselor and other data relating to number and duties of counselors. Granted that errors have been demonstrated, we fail to see that the re-

ports have any relevance to plaintiff's claim of discrimination. Since plaintiff totally failed to prove "that race was a substantial or motivating factor" in the employment decisions affecting her, she did not make out a prima facie case under the fourteenth amendment or §§ 1981 and 1983. *Whiting, supra*, slip op. at 5107.

State Law Contract Claims.

Plaintiff also asserts a breach of contract claim under Mississippi law for the defendants' refusal to honor the employment contract she signed as career awareness counselor in the spring of 1977 that did not contain a Title I clause. The evidence shows that such an instrument was tendered by Superintendent Ellard, who inadvertently omitted the Title I provision, and that it was his intention to employ plaintiff under the identical program by which she had been paid the previous year, 1976-77. The evidence also shows that when Ellard attempted to correct the omission, plaintiff refused to sign the revised agreement. Plaintiff can claim no enforceable contract rights under the circumstances, for she was never recommended to the school board by the superintendent and not hired by the board pursuant to his recommendation. The board refused to delete the Title I provision, and plaintiff refused to consider employment under Title I. Hence, under Miss. Code Ann. § 37-9-17 (1972), plaintiff has no rights enforceable against the school board for an instrument which never ripened into an enforceable contract, for only the board has the legal authority to hire.

In addition, the contract which plaintiff seeks to have enforced called for her services as a migrant awareness counselor, and the migrant program was cancelled before the 1977-78 school year began because of the loss of many migrant students. Even had the board approved the 1977-78 contract, it would have been incapable of performance, and plaintiff would have been without a job. Plaintoff's state law claim for breach of contract is therefore without merit and must be rejected.

Claims for Relief.

Plaintiff's recovery of damages, actual or punitive, for emotional distress and other losses she may have experienced as an employee of the Clarksdale school system, of course, depends upon her establishing that the defendants have violated a right protected by federal or state law. She has failed to show either that she was the victim of racially discriminatory employment policies or that defendants have engaged in tortious practices for which they owe her damages. Plaintiff has also failed to show that the school board, or any of the school officials, are guilty of breach of contract. Therefore, she must be denied all relief, including injunctive relief, monetary damages, attorney fees, and costs.

Let an order issue accordingly,

This, 2nd day of June, 1980.

WILLIAM C. KEADY

/s/ .....

WILLIAM C. KEADY
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

No. DC 77-94-K-O

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, *et al.*,

Defendant.

Order

Pursuant to Rule 16, Federal Rules of Civil Procedure, and Rule C-10 of the Local Rules of this Court, a pretrial conference was held before the magistrate in the above entitled action on March 16, 1979.

The following schedule for preparation and submission of the pretrial order is hereby established:

1. Counsel for plaintiff will prepare in the form prescribed by the court a pretrial order accurately reflecting the proceedings had and done at the pretrial conference, and will submit it, bearing his signature, to opposing counsel on or before May 14, 1979. If there is more than one other party, the original order shall be submitted to counsel for one of them, and copies shall simultaneously go to all others.

2. Promptly upon receipt of the proposed pretrial order from counsel for plaintiff, counsel for each other party will carefully review it to determine whether or not it is consistent with the agreements and understandings reached at the pretrial conference. If any party desires changes in the pretrial order, it will be the duty of counsel for that party to discuss his proposed changes with

counsel for *all* other parties and to obtain their consent to the changes proposed. If consent is obtained, the attorney requesting the changes will be responsible for preparing the necessary modifications of the pretrial order. Once the order is in proper form, counsel will sign it and circulate the original for signature by counsel for any party who has not yet signed. Where multiple parties are involved, the circulation of the original pretrial order for signature must be so timed as to assure its timely submission to the magistrate.

3. On or before June 1, 1979, counsel will submit to the magistrate at P. O. Box 1353, Greenville, Mississippi 38701, the original and two copies of the pretrial order signed by counsel for each party.

4. (a) Upon consideration of ore tenus motion of plaintiff to compel discovery, it is ordered that within 10 days of this date, defendants will produce for plaintiff's inspection and copying, the master schedule list for Clarksdale High School for the years 1970-77, and shall also produce the salary schedule applicable to Clarksdale High School for each of said years. In all other respects plaintiff's said motion to compel is denied.

(b) Upon consideration of the plaintiff's motion to bifurcate trial of the legal and equitable issues in this action and for trial jury on the legal issues, plaintiff's said motion is denied.

(c) Upon consideration of defendants' motion to reopen the pretrial motion cut-off for the purpose of permitting defendants to serve a motion to dismiss the plaintiff's claims under Title VII of the Civil Rights Act of 1964, as well as other unspecified motions, defendants' said motion is denied.

(d) The parties are allowed 30 days from this date within which to serve notice upon each other of additional exhibits and/or witnesses to be listed

in the final pretrial order. Within 7 days after expiration of said 30-day period, each party shall advise the other of any objections, either as to authenticity or admissability, to any of the opposing parties' proposed exhibits. Within the same time, counsel for the parties shall confer for the purpose of finalizing stipulations agreed to in principal at the pretrial conference and for the purpose of arriving at additional stipulations as discussed during the course of the conference.

The foregoing schedule has been established to assure the availability of the pretrial order to the court in advance of the trial date. No extensions of time should be requested except for the most compelling cause, as none will be granted except for such cause.

The preparation and timely submission of the pretrial order to the magistrate is the *joint responsibility of all counsel appearing in the case.* It is counsel's duty to cooperate with each other to assure that the proceedings taken at the pretrial conference are accurately reflected in the pretrial order, and that the schedule herein fixed is faithfully adhered to.

SO ORDERED, this the 19th day of March, 1979.

NORMAN L. GILLESPIE

.....

Clerk

Not LEG.

/s/ .....

Deputy

Not LEG.

/s/ .....

United States Magistrate

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

No. DC 77-94-K

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, LEON PORTER, JR., GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., Individually and in their official capacities as Members of the Board of Trustees of the Clarksdale Municipal Separate School District, ROBERT M. ELLARD, Individually and in his official capacity, Superintendent of Education on the Clarksdale Municipal Separate School District, TERRY MOOD, Principal Clarksdale High School,

Defendants.

Judgment

Upon the call of this case, all parties appeared in person and by their attorneys and announced their readiness for trial. After introduction of evidence, oral and documentary, and receipt of memorandum briefs from counsel, and the court having maturely considered the matter and concluded that the plaintiff, Verdia Jones, is not entitled to recover in this cause for the reasons set forth in Memorandum Opinion this date released; it is accordingly

ORDERED

That the plaintiff, Verdia Jones, be denied all relief, including injunctive relief, monetary damages, attorney fees and costs, and that her complaint herein be finally dismissed with prejudice.

All costs are taxed to plaintiff.

This, June 2, 1980.

WILLIAM C. KEADY

/s/ .....

WILLIAM C. KEADY
Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

No. DC 77-94-K

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, *et al.*,

Defendants.

Order

The court has before it plaintiff's motion to strike demand for jury trial filed herein. In this suit, seeking redress from alleged racial discrimination in employment, plaintiff seeks injunctive relief as well as back pay under 42 U.S.C. § 1981 and joins therewith claims for compensatory and punitive damages under 42 U.S.C. § 1983. Apparently, defendants are of the view that because of this joinder of claims, they have a right to jury trial. We disagree. Indeed, it is well settled that there is no right to jury trial in an employment discrimination suit under § 1981 or § 1983 even though claims for compensatory or punitive damages are made. *Lynch* v. *Pan American World Airways, Inc.*, 475 F.2d 764 (5th Cir. 1973); *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319 (5th Cir. 1970). Accordingly, it is

ORDERED

That defendants' demand for jury trial is hereby stricken and this cause placed on the court's nonjury calendar.

This, 3rd day of January, 1978.

WILLIAM C. KEADY

/s/ .....

WILLIAM C. KEADY
Chief Judge
United States District Court

NORMAN L. GILLESPIE

.....

Clerk

Not LEG.

/s/ .....

Deputy

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

No. DC 77-94-K

RECEIVED: JUL 13, 1978

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, *et al.*,

Defendants.

Order

The court has before it defendants' motion to reconsider our January 3, 1978, order striking jury demand in this employment discrimination lawsuit. Upon due consideration thereof, it is

ORDERED

That defendants' motion for reconsideration is hereby denied.

This, 12th day of July, 1978.

WILLIAM C. KEADY

/s/ .....

WILLIAM C. KEADY
Chief Judge
United States District Court

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-3535

FILED: JUL 19, 1982

VERDIA JONES,

Plaintiff-Appellant,

—v.—

ROBERT BIRDSONG, *et al.*,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

On Petition for Rehearing and Suggestion for Rehearing *En Banc*

(Opinion May 24, 1982, 5 Cir., 1982, — F.2d —).

(July 19, 1982)

Before BROWN, COLEMAN and RUBIN, Circuit Judges.

Per Curiam:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

Not LEG.

.....
United States Circuit Judge

CLERKS NOTE:
SEE RULE 41 PRAP AND LOCAL RULE 17 FOR STAY OF THE MANDATE

EXHIBIT "B" REHG-6

SUPREME COURT OF THE UNITED STATES

No. A-331

VERDIA JONES,

Petitioner,

—v.—

ROBERT BIRDSONG, *et al.*,

Defendant.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including November 6, 1982.

BYRON R. WHITE

/s/ .....

BYRON R. WHITE
Associate Justice of the Supreme
Court of the United States

Dated this 7th day of October, 1982.

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

Civil Action No. DC-77-94-K

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, LEON PORTER, JR., GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., Individually and in their official capacities as Members of the Board of Trustees of the Clarksdale Municipal Separate School District, ROBERT M. ELLARD, Individually and in his official capacity, Superintendent of Education on the Clarksdale Municipal Separate School District, TERRY MOOD, Principal Clarksdale High School,

Defendants.

Demand for Trial by Jury of Certain Issues Only

Trial by jury in the above-entitled cause is hereby demanded by defendants of the following issues:

1) Plaintiff's claim for back pay.

2) Plaintiff's claim for compensatory damages.

3) Plaintiff's claim for punitive damages.

Dated November 22, 1977.

Not LEG.

/s/ .....
Attorney for Defendants

CERTIFICATE OF SERVICE

A copy of the foregoing Demand for Trial by Jury of Certain Issues Only was this day mailed, postage prepaid, to Hon. Victor McTeer, attorney for plaintiff, addressed to him at 819 Main Street, Greenville, Mississippi 38701.

Dated November 22, 1977.

Not LEG.

/s/ .....
Attorney for Defendants

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF MISSISSIPPI

DELTA DIVISION

Civil Action No. DC-77-94-K

VERDIA JONES,

Plaintiff,

—v.—

ROBERT BIRDSONG, LEON PORTER, JR., GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., Individually and in their official capacities as Members of the Board of Trustees of the Clarksdale Municipal Separate School District, ROBERT M. ELLARD, Individually and in his official capacity, Superintendent of Education on the Clarksdale Municipal Separate School District, TERRY MOOD, Principal Clarksdale High School,

Defendants.

Motion to Strike

Comes now the plaintiff herein and moves the Court for an order striking any and all requests of defendants for trial by jury regarding plaintiff's demand for back pay.

Respectfully submitted,

CHARLES VICTOR MCTEER

/s/ .....

CHARLES VICTOR MCTEER
McTeer, Walls, Bailey & Buck
P.O. Box 634
Greenville, Mississippi 38701

CERTIFICATE

I, Charles Victor McTeer, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing Motion to Strike to Honorable Semmes Luckett, 121 Yazoo Ave., Clarksdale, Mississippi, 38614.

This the 29th day of November, 1977.

CHARLES VICTOR MCTEER

/s/ .....

CHARLES VICTOR MCTEER

Office-Supreme Court, U.S.
FILED
JAN 27 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-784

In the Supreme Court of the United States

October Term, 1982

VERDIA JONES,
Petitioner,

vs.

CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ROBERT BIRDSONG, LEON PORTER, GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., ROBERT ELLARD, TERRY MOOD,
Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

SEMMES LUCKETT
(Counsel of Record)
121 Yazoo Avenue
Clarksdale, Mississippi 38614
(601) 624-8366
Attorney for Respondents

E. L. MERRENBALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-2030

QUESTION PRESENTED FOR REVIEW

Petitioner asks this Court to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit in order to determine whether it erred in affirming the judgment of the District Court without requiring that Court to submit her claims for compensatory and punitive damages to a jury for determination. She is not entitled to the issuance of such a writ. She did not have a right to a determination of such issues by a jury. She did not file a demand for a trial by jury of such issues after the Judge of the District Court had refused to grant defendants (now respondents) their demand for a trial by jury of such issue. She never made known to the Judge of the District Court who tried the case that she wished to have a trial by jury of such issues. She was present and participated in a four-day trial without making known to the District Judge her desire for a trial by jury of such issues. She failed to show that she had been discriminated against because of her race in an employment discrimination case brought under Sections 1981 and 1983, the Equal Protection Clause of the 14th Amendment, and Title VII of 42 U.S.C. §2000e. Hence she would not have gotten to the jury for a determination of these issues even if the Judge of the District Court had empaneled a jury of his own volition.

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No. 82-784

In the Supreme Court of the United States

October Term, 1982

VERDIA JONES,
Petitioner,

VS.

CLARKSDALE MUNICIPAL SEPARATE SCHOOL DISTRICT, ROBERT BIRDSONG, LEON PORTER, GLENN D. GATES, MAYO WILSON, JESSIE G. HUGHES, JR., ROBERT ELLARD, TERRY MOOD,
Respondents.

ON WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

On September 23, 1977, petitioner Verdia Jones, a former counselor in the Clarksdale, Mississippi school system, filed her complaint against respondents, members of the Board of Trustees of the Clarksdale Municipal Separate School District; the School District; Dr. Robert M. Ellard, Superintendent of Schools; and Terry Mood, Principal of the Clarksdale High School, basing it on (a) Section 1981 of the Civil Rights Act of 1866 and Section 1983 of the Civil Rights Act of 1871 (42 U.S.C. §1981 and §1983), (b) the equal protection clause of the Fourteenth Amendment

to the Constitution of the United States, and (c) the Singleton Provision of *Henry*, which was the school desegregation case against the School District, seeking reinstatement of her contract with the School District, with the same job responsibilities as were held by her prior to the order of this Court in *Henry* rendered January 10, 1970, with back pay plus compensatory and punitive damages. She contended that she had been discriminatorily discharged by the School District because of her race, which was black.

It appeared that petitioner's employment with the Clarksdale Municipal Separate School District had begun as a teacher-counselor during the school year 1962-63. In September, 1963, she became a full-time counselor at the then all-black Higgins High School, where she continued in such position until February, 1970, when she was employed by the School District as a counselor in Clarksdale High School for the remainder of the school year 1969-70, at a salary of $8,804.00, after an order of the District Court required the merger of the former white and former all black junior-senior high schools of the School District. She was re-employed as a Counselor in Clarksdale High School for the school years 1970-71, 1972-73, 1973-74, 1974-75, 1975-76, at a constantly increased salary.

Petitioner was re-employed as Career Awareness Counselor, in the Migrant Program of the School District, for a 10-month period, including the school year 1976-77, at a salary of $12,895.00, the same as that received during the preceding school year for an 11-month period of service. She was, of course, required to perform duties as Migrant Career Awareness Counselor, as her contract required.

During the school year 1976-77, the Board of Trustees of the Clarksdale Municipal Separate School District,

through Dr. Ellard, its superintendent of schools, offered plaintiff a contract of employment for the school year 1977-78, conditioned upon the availability of Title I funds. It was rejected by her because of it being conditioned upon the availability of Title I funds.

Despite the fact that all other contracts made by the Board of Trustees of the School District with employees who were to be paid from Title I funds had similar clauses to the one which petitioner found so offensive, Dr. Ellard, at petitioner's insistence, agreed to ask the Board of Trustees of the School District to delete the offending paragraph from petitioner's contract. He did so, just as he had promised to do. The Board of Trustees of the School District refused his request on the ground that if it deleted it from one contract, it would have to delete it from all contracts, which it was forbidden by laws so to do. It had approximately 75 employees, about equally divided between white and black, who were employed under such contracts.

At the Board of Trustees' direction, Dr. Ellard again offered petitioner a contract of employment for the school year 1977-78, explaining to petitioner why it had to be conditioned on the availability of Title I funds. She rejected that contract also, for the same reason she had rejected the other.

Since petitioner left the school system, no other person has been hired as a counselor to take her place.

Prior to the merger in January, 1970 of the two Senior High Schools and two Junior High Schools into one High School and one Junior High School, the building known as the Bobo Building housed the white Clarksdale High School, and that known as the Dorr Building housed the white Junior High School. As a result of the merger,

all high school pupils of the School District, black and white, formed one High School, housed in the two buildings, and all junior high school pupils of the School District, black and white, formed one Junior High School, housed in the building which housed the black High School.

When, in February, 1970 petitioner was made a Counselor in Clarksdale High School, James Grimmett, a white male who had acted as Counselor in Clarksdale High School prior to the merger, was also named as a Counselor in the school. He remained in the office he had previously occupied until employed in another capacity in 1974, and Robert Eavenson, a white male, was named his successor and took over the same office.

In February 1970, petitioner was stationed in the same suite of offices in the Dorr Building as housed Mr. Joseph Hardy, a black male who had been assigned as assistant principal of Clarksdale High School. Mrs. Helen Green, a white female, was their secretary. The superintendent of schools also had his offices in the Dorr Building.

Immediately following February 1970, all records of black students formerly at Higgins High School were kept in the Dorr Building, in the suite of offices maintained for Mr. Hardy and petitioner. As soon as possible, such records were consolidated with those of other pupils in Clarksdale High School.

In May 1972, the Superintendent moved his office from the Dorr Building to the newly built Administration Center.

Mr. Kendricks, who had been made assistant principal upon the resignation of Mr. Hardy, moved into his vacated office, with Mrs. Green as his secretary. Later Kendricks, as principal, moved to an office in the Bobo Building, again with Mrs. Helen Green as his secretary.

During the school year 1974-75, when Terry Mood succeeded Mr. Kendricks as principal, James Grimmett became assistant principal and Robert M. Eavenson was named Counselor in his place.

Petitioner asserted in her original complaint that she was discriminated against in favor of the two white counselors: Mr. Grimmett, who served with her from February 1970 through the school year 1973-74, and Mr. Eavenson, who served with her from the school year 1974-75 to her refusal of re-employment in 1977. The District Judge disagreed with her conclusions, holding that petitioner was not discriminated against in favor of either of her white counterparts.

On November 22, 1977, five days after the filing of an answer to petitioner's complaint, respondents (defendants in the District Court) filed their demand for a jury trial of certain issues in the case:

"DEMAND FOR TRIAL BY JURY OF CERTAIN ISSUES ONLY

"Trial by jury in the above-entitled cause is hereby demanded by defendants of the following issues:

1) Plaintiff's claim for back pay.

2) Plaintiff's claim for compensatory damages.

3) Plaintiff's claim for punitive damages.

Dated November 22, 1977.

/s/ Semmes Luckett,
Attorney for Defendants"

Thereafter, petitioner (plaintiff in the District Court) filed her Motion to Strike in the following language:

"MOTION TO STRIKE

"Comes now the plaintiff herein and moves the Court for an order striking any and all requests of defendants for trial by jury regarding plaintiff's demand for back pay.

Respectfully submitted,

/s/ Charles Victor McTeer"

It should be noted that petitioner (plaintiff in the District Court) did not, in her Motion to Strike, specify the issues which she wishes to be tried by a jury, and that in her motion she did not demand trial by jury for all the issues so triable.

On January 3, 1978, Chief Judge William C. Keady issued the following Order in the case:

"ORDER

"The court has before it plaintiff's motion to strike demand for jury trial filed herein. In this suit, seeking redress from alleged racial discrimination in employment, plaintiff seeks injunctive relief as well as back pay under 42 U.S.C. §1981 and joins therewith claims for compensatory and punitive damages under 42 U.S.C. §1983. Apparently, defendants are of the view that because of this joinder of claims, they have a right to jury trial. We disagree. Indeed, it is well settled that there is no right to jury trial in an employment discrimination suit under §1981 or §1983 even though claims for compensatory or punitive damages are made. Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973); Harkless v.

Sweeny Independent School District, 427 F.2d 319 (5th Cir. 1970). Accordingly, it is

"ORDERED

"That defendants' demand for jury trial is hereby stricken and this cause placed on the court's nonjury calendar.

"This, 3rd day of January, 1978.

/s/ WILLIAM C. KEADY, Chief Judge
United States District Court"

It should also be noted that the District Judge, in his Order of January 3, 1978 treated plaintiff's Motion to Strike to be that which it was described to be, i.e., as a Motion to Strike, when he struck defendants' demand for jury trial and directed that the cause be placed on the court's non-jury calendar, for in it he described it as a "motion to strike demand for jury trial," to which plaintiff, now petitioner, did not object. In other words, the Motion to Strike filed by the plaintiff - now petitioner - was never considered by the District Court to be a demand by her for a jury trial on the issues of her claim for compensatory damages or her claim for punitive damages, and she never advised the District Judge that it should be so considered.

After receipt of the District Judge's Order of January 3, 1978, the attorney who drafted the demand for jury trial took another look at the authorities he had relied upon in drafting such demand and came to the conclusion that because a claim for back pay is but an integral part of the equitable remedy of injunctive reinstatement, the District Court was correct in refusing a jury trial of plaintiff's claim for back pay, but that perhaps his clients might be entitled to a jury trial on the

issues of plaintiff's claims to compensatory and punitive damages. Accordingly, on June 15, 1978, on behalf of his clients, the defendants in the District Court, he moved the District Court to reconsider its Order of January 3, 1978. At the same time such attorney admitted, in the Memorandum of Authorities submitted in connection with such motion, his error in demanding a jury trial of plaintiff's claim for back pay, and filed the same—the Motion and the Memorandum of Authorities—as required by Rule 5(a) of the Rules of Civil Procedure.

Despite the fact that copies of the Motion to Reconsider the Order of January 3, 1978, and of the Memorandum of Authorities in which the error in asking for a trial by jury of the issue of plaintiff's claim to back pay was admitted, were sent to petitioner's attorney, and despite the fact that the defendants in the District Court were taking the position now espoused by him, not a word, not a peep, was uttered by him, either in support of or in opposition thereto.

On July 12, 1978, the District Judge denied defendants' motion to reconsider his January 3, 1978 Order by this Order of that date:

"ORDER

"The court has before it defendants' motion to reconsider our January 3, 1978, order striking jury demand in this employment discrimination lawsuit. Upon due consideration thereof, it is

"ORDERED

"That defendants' motion for reconsideration is hereby denied.

"This, 12th day of July, 1978.

/s/ WILLIAM C. KEADY, Chief Judge
United States District Court"

Three days before the filing of her original complaint herein, petitioner filed a charge with the Equal Employment Opportunity Commission alleging that her employer, Clarksdale Municipal Separate School District, had discriminated against her. Robert Ellard and Terry Mood were named therein as "others who discriminated against you." On September 22, 1977, a Notice of such charge was served on Clarksdale Municipal Separate School District. *No investigation of the charge was ever made and no determination was ever arrived at that there was reasonable cause to believe that the charge was true.*

On July 18, 1978, the United States Department of Justice sent plaintiff "a right to sue the Clarksdale Municipal Separate School District letter."

Petitioner thereupon, on August 3, 1978, which was after Chief Judge Keady had refused defendants' demand for a jury trial of certain issues in the case, and after Chief Judge Keady had denied defendants' motion to reconsider his order of January 3, 1978, amended her complaint so as to include a claim under Title VII against all of respondents, including the members of the Board of Trustees, the Superintendent of Schools and the Principal of Clarksdale High School.

After a four-day trial, Chief Judge Keady (the District Judge who heard the case) handed down a 32-page Memorandum Opinion in which, after describing petitioner's complaints in detail and after delineating the facts with respect to such complaints, he held against petitioner on all facets of the case. Judgment of Dismissal with Prejudice was thereupon entered.

Petitioner then prosecuted an appeal from such judgment to the Court of Appeals for the Fifth Circuit, but no longer pursued any claim under the Singleton provisions

of *Henry*. That court, after hearing arguments in the case, affirmed the judgment of the District Court by a two to one vote. Petitioner then filed with that court a Petition for Rehearing and a Suggestion for a Rehearing en banc, which it denied; no member of the panel, which included Judge Rubin, the one who had dissented from the opinion affirming the judgment of the District Court, nor any Judge in regular active service on the Court having requested that the Court be polled on the question.

Now petitioner asks the Supreme Court of the United States to issue a Writ of Certiorari to the Court of Appeals for the Fifth Circuit in order to determine whether petitioner's claim for compensatory and punitive damages should have been tried by a jury.

Respondents state that there is no reason why a Writ of Certiorari should issue herein, no error having been committed by the Court of Appeals for the Fifth Circuit in its disposition of the action. The judgment of the District Court should have been affirmed.

SUMMARY OF ARGUMENT

"This," in the words of the late Mr. Justice Frankfurter, "should be a horse easily curried."

First, petitioner did not have a right to a jury determination of her claims to compensatory and punitive damages. The cases on that point seem to be clear, although a conclusion to that effect is not necessary to a denial of petitioner's petition. She waived whatever rights, if any, she may have had to a jury trial of those issues, as will be pointed out herein.

Second, she did not file a demand for a jury trial of those issues, as required by Rule 38 of the Rules of Civil Procedure, with the result that she waived the same. It is true that respondents (defendants in the District Court) made a demand for a trial by jury of certain issues in the case, including petitioner's claim for a trial by jury of her claim for compensatory and punitive damages, on November 22, 1977, and that petitioner had the right to rely on such demand as long as it was not denied by the Judge of the District Court. But after respondents' demand for a trial by jury of certain designated issues in the case was denied by Judge Keady, which it was on January 3, 1978, petitioner no longer had a right to rely thereon. Had she thereafter wished a jury trial of her claims to compensatory and punitive damages, she was required by Rule 38 of the Rules of Civil Procedure to demand the same, and was subject to sub-paragraph (d) thereof, which reads as follows:

> "(d) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . . ."

Third, petitioner was present and participated in a four-day trial without making known to the District Judge

that she wished a jury trial of her claims for compensatory and punitive damages. The cases hold that by so doing she waived whatever right, if any, she may have had in a trial by jury of those issues. Counsel's lame excuse that otherwise he might have incurred the wrath of Judge Keady, while quite ingenious, will not hold water, particularly to those who know Counsel to be oblivious to consequences. Nor does it do Chief Judge Keady credit. To suggest that a District Judge would somehow punish an attorney who followed the requirements of the Rules of Civil Procedure is not even good nonsense. For someone who knows Judge Keady to so suggest borders on the unbelievable.

And fourth, petitioner failed to show that she had been discriminated against because of her race. Had the District Judge empaneled a jury in the case, exercising his discretionary right so to do, and had he come to the conclusion, as he did, that petitioner had not shown that she was discriminated against because of her race, he would necessarily have had to grant defendants a directed verdict in their favor. As Chief Judge Keady concluded:

> "Plaintiff's recovery of damages, actual or punitive, for emotional distress and other losses she may have experienced as an employee of the Clarksdale school system, of course, depends upon her establishing that the defendants have violated a right protected by federal or state law. She has failed to show either that she was the victim of racially discriminatory employment policies or that defendants have engaged in tortious practices for which they owe her damages. Plaintiff has also failed to show that the school board, or any of the school officials, are guilty of breach of contract. Therefore, she must be denied all relief, including injunctive relief, monetary damages, attorney fees, and costs."

ARGUMENT

Petitioner Did Not Have a Right to a Trial by Jury of Her Claims to Compensatory and Punitive Damages

The question of whether one has a right to a trial by jury of such claims is very often hard to decide. Fortunately, respondents can take the position also taken by the Fifth Circuit in this case, that it is not necessary to a decision herein to first determine if petitioner had such a right or not. She waived her right to a trial by jury of her claims to compensatory or punitive damages, if she ever had such a right.

It is the opinion of the writer that petitioner had no right to a jury trial of such issues. If Chief Judge Keady was right in deciding that defendants in the trial court had no such right (and I now know he was), including a right to a jury trial of the issue of back pay, then, under the authority of the cases cited by him, that of *Lynch v. Pan American World Airways, Inc.*, 475 F.2d 764, and *Harkless v. Sweeny Independent School District*, 427 F.2d 319, neither did petitioner. Insofar as the later introduction of petitioner's claim under Title VII is concerned, *Grayson v. Wickes Corporation*, 607 F.2d 1194, is but one of the latest cases which hold that there is no jury trial right in a Title VII action. As has been said, not all forms of monetary relief can be characterized as "legal" relief.

Petitioner Waived Any Claim She May Have Had to a Jury Trial by Her Failure to Demand One After the District Judge Had Ruled That Defendants Had No Such Right

No better answer can be made to petitioner's contention that she had a right to a jury's determination of

her claim to compensatory and punitive damages than by quoting what the Court of Appeals for the Fifth Circuit had to say about it:

> "Now, let us see what happened in this case.
>
> "The defendants filed their answer to the original complaint and timely filed a request for a jury trial for Mrs. Jones' back pay claims, compensatory damages, and punitive damages. Mrs. Jones moved to strike the demand for a jury trial on the back pay issue. The Court responded by denying a jury trial on all issues. *Mrs. Jones raised no objection to this ruling.*
>
> "Mrs. Jones then filed an amended complaint. There was no Rule 38(b) motion for a jury trial and none was ever filed. However, at a pretrial conference before a magistrate the plaintiff moved *verbally* for a bifurcated trial of the legal and equitable issues, with a jury trial on the legal issues. The magistrate denied the motion. This action was never called to the attention of the District Judge. There was no objection filed. When the case came to trial on the merits before Judge Keady, the plaintiff said absolutely nothing about the denial of the motion at the hands of the magistrate. Not a word was said about desiring a jury trial. Mrs. Jones now attempts to evade all this by saying that any complaint or objection would have been useless because the Judge had already denied the defendants' request for a jury trial. This is an attempted evasion of the undisputable fact that when the Court made that ruling at an early stage of the litigation the plaintiff had offered no remonstrance or objection whatever, thus leading the Court to believe that she agreed with that result.

"Under the circumstances, the plaintiff was under a special duty to speak out about any desire for a jury. Her counsel knew, or was certainly charged with the knowledge, that in the case of Lynch v. Pan American World Airways, Inc., 475 F.2d 764 (5th Cir. 1973), in a racial discrimination case which sought reinstatement with back pay, compensatory damages, and punitive damages, the Fifth Circuit held that the trial court properly struck the plaintiff's motion for a jury trial because the action was equitable in nature. Unless the point were raised and unless there was convincing argument to the contrary, Mrs. Jones should have expected that the District Judge would consider himself bound by the ruling in *Lynch*.

"In conclusion, we cannot countenance an effort to reverse the District Court from ambush.

"As already pointed out, plaintiff sought no review of the magistrate's ruling, which was made after the filing of an amended complaint. We have repeatedly held that in the absence of exceptional circumstances provoking a miscarriage of justice questions that are not presented to or passed on by the trial court (here, the ruling of the magistrate) will not be considered an appeal." (Citing cases.)

"What it all comes down to is that plaintiff had repeated opportunities to file a Rule 38(b) motion for a jury trial and she chose not to do it. When Judge Keady denied the defendants' motion for a jury trial the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial

of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury.

"Leaving aside the issue of whether she would have been entitled to a jury if she had properly sought such a trial, we firmly decline the suggestion that the District Court should be cast in error."

No one disputes that the cases hold that a party may rely on the demand of his opponent for a trial by jury.

Nor does anyone dispute that on March 19, 1979, the United States Magistrate made an order resulting from the pretrial conference of March 16, 1979, in which he recited that "upon consideration of plaintiff's motion to bifurcate trial of the legal and equitable issues in this action and for a jury trial of the legal issues, plaintiff's said motion is denied." Frankly, the writer does not remember the making of such a motion, but he does not deny that one was made. He does know, however, that the Order on pages 44 to 46, both inclusive, of the Petition for Certiorari is not a true copy of that Order. The original order in the clerk's office has no lines for the clerk of the court or his deputy to sign, and it is signed by J. David Orlansky, United States Magistrate. Hence the statement in respondents' brief in the Fifth Circuit that "plaintiff-appellant's claim that she should be accorded a jury trial on the issues of compensatory and punitive damages comes as a distinct surprise to the writer, as it doubtless will to Chief Judge Keady."

In the Order no reason is given for the denial of the motion. However, it is obvious from a reading of Rule 38 of the Rules of Civil Procedure that any such motion must be in writing, that it must be filed not later than 10 days after service of the last pleading directed to the issue sought to be determined by a jury, and that it must be filed as required by Rule 5(d) of the Rules of Civil Procedure, which means that it must be served upon the party and filed with the court either before service or within a reasonable time thereafter. It is assumed that the motion was denied because of plaintiff's failure to obey the requirements of the Rule.

As a matter of fact, knowing the ability and industry of counsel for petitioner, as does the writer of this brief, doubts arise as to whether he or his client ever desired a trial by jury of any issue in the case. After all, Chief Judge Keady is generally considered to be a most liberal judge, and no one ever thought that a jury trial of any issue in the case would be sought by plaintiff. It was because of Chief Judge Keady's bent that defendants in the lower court tried to have as many issues determined by a jury as possible.

The foregoing is not said as any reflection on Chief Judge Keady. He is an extremely able, articulate and fair minded judge. It is for that reason that in any school case the writer is fortunate enough to win, his reasoning is stressed in the Court of Appeals for the Fifth Circuit. He is well known in that court as a judge who does not decide cases against plaintiffs in school cases unless required by the facts to do so. Witness the opinion in *Henry*, 579 F.2d 916, wherein the School District was held not to be liable for attorney's fees because it had not been obdurately obstinate in adopting the desegregation plans called for by the decisions of that court.

Certainly defendants agree with the conclusions of the Fifth Circuit that when Judge Keady denied the defendants' motion for a jury trial the plaintiff knew that she could no longer rely on that motion to obtain a jury trial for herself but said not a word, leaving the Judge to believe that she agreed with that result. She had every opportunity to ask the trial court to review and reverse the denial of a jury trial entered by the magistrate. She chose to pursue a policy of total silence. When the trial began there was not a word said about the lack of a jury. Now that the facts have been found against her contentions, amply supported by the record, she does here what she persistently chose not to do below—she cries that she was denied the right of trial by jury.

Petitioner was therefore clearly responsible for following the requirements of Rule 38 of the Rules of Civil Procedure and subject to the penalty for not complying therewith. Since there is no question but that she did not comply with those requirements, she is subject to the penalty provided therein, which is -

> "(d) The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. . . ."

Petitioner Waived Her Right to a Jury Trial of the Issues of Compensatory and Punitive Damages by Being Present and Participating in a Four-Day Trial Without Making Known to the Court of Her Desire for a Jury Trial of Such Issues

Petitioner does not deny that she was present or participated in a four-day trial and that she never once asked the District Judge, at any stage of the trial, to give

her a jury trial of her claims for compensatory and punitive damages.

There are so many cases which hold that being present and participating in a trial, without making one's objection known to the trial judge, waives one's right to a jury trial and results in a waiver thereof, and there being no denial of such proposition, no citations are needed.

Petitioner seeks to get around that proposition by claiming that her insistence on her rights would raise the Court's ire. That simply is not true. It does the Court no credit to suggest it. All petitioner had to do to pursue her right to a jury trial, if she was entitled to one, was to ask the court for a trial by jury of those issues which she wished so tried. All the District Judge could—or would—have done would have been to grant or deny her request. In any event, petitioner would have preserved her right to complaint of the actions of the District Judge. Not having done so, either by choice or for some other reason, waives her right to a trial by jury.

The District Court, by Determining That Petitioner Had Failed to Show That She Had Been Discriminated Against Because of Her Race, Precluded Any Determination by a Jury of Petitioner's Right to Compensatory and Punitive Damages and Foreclosed Petitioner From Complaining of Its Absence

Attention is called to the fact that after the trial, Chief Judge Keady declared -

> "Plaintiff's recovery of damages, actual or punitive, for emotional distress and other losses she may have experienced as an employee of the Clarksdale School system, of course, depends upon her establishing that the defendants have violated a right protected

> by federal or state law. She has failed to show either that she was the victim of racially discriminatory employment policies or that defendants have engaged in tortious practices for which they owe her damages. Plaintiff has also failed to show that the school board, or any of the school officials, are guilty of breach of contract. Therefore, she must be denied all relief, including injunctive relief, monetary damages, attorney fees, and costs."

By determining that petitioner was not entitled to monetary relief, Chief Judge Keady foreclosed any right which she may have had to complain about the absence of a jury's determination of the issues of compensatory and punitive damages. As the Court of Appeals for the Fifth Circuit said in *United States v. Williams*, 441 F.2d 637, 644 (1971):

> ". . . . Although the District Judge should have recognized Williams' right to a jury trial, he should also have directed a verdict in favor of the United States. On this ground we affirm his judgment, since no issue remained for jury determination. There is no constitutional right to have twelve men sit idle and functionless in a jury box. United States v. 243.22 Acres of Land, 2 Cir. 1942, 129 F.2d 678, Cert. denied, 317 U.S. 698, 63 S.Ct. 441, 87 L.Ed. 558."

In *Coleman v. Associated Pipeline Contractors, Inc.*, 444 F.2d 737 (1971), a Fifth Circuit case which originated in Mississippi, the court held that "since Associated was not a trespasser and the embankment was not an attractive nuisance, the contractor's legal duty to Ida Darleen Coleman could only be to refrain from willful or wanton injury," and since appellants had failed to prove their case under such theory, a directed verdict against them was appropriate. In affirming, the appellate court said:

"Normally the issue should be submitted to the jury. Nevertheless, having considered all the evidence and testimony available to the District Judge, we conclude that the Colemans have not satisfied the *Boeing* criteria. See United States v. Williams, 5 Cir. 1971, 441 F.2d 637, 644. In the factual context *sub judice*, it is evident that Associated fulfilled its duty to refrain from willfully or wantonly injuring Ida Darleen. Consequently we shall not disturb the District Court's disposition of this controversy."

In *Galloway v. United States*, 319 U.S. 372, 87 L.Ed. 1458, 1470 (1942) this Court said:

"If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century."

See also, *Cox v. City of Freeman, Mo.*, 321 F.2d 887 (1863); *Joachim Memorial Home v. Askew*, 404 F.Supp. 1154.

CONCLUSION

With apologies for the length of this brief, with a bow to the old adage that if the writer had been given more time he would have written a shorter brief, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

SEMMES LUCKETT
(Counsel of Record)
121 Yazoo Avenue
Clarksdale, Mississippi 38614
(601) 624-8366
Attorney for Respondents

CERTIFICATE OF SERVICE

I, Semmes Luckett, do hereby certify that I have this day mailed, via United States mail, a true and correct copy of Respondents' Brief in Opposition to Petition for Certiorari to Hon. Charles Victor McTeer, P. O. Box 1835, Greenville, MS 38701-0173.

This 26th day of January, 1983.

/s/ Semmes Luckett
Semmes Luckett